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A POLICY ORIENTED APPROACH TO WITNESS PROTECTIVE MEASURES AT THE INTERNATIONAL CRIMINAL COURT

THE DEGREE OF DOCTOR OF PHILOSOPHY

STEVEN WILLIAM STEWISTA KAYUNI

SUSSEX LAW SCHOOL

SCHOOL OF LAW, POLITICS AND SOCIOLOGY

UNIVERSITY OF SUSSEX

SEPTEMBER 2016

ACKNOWLEDGEMENTS

I would like to sincerely thank Professor Richard Vogler and Dr. Alex Conte for their time, constructive guidance and recommendations during the writing of this thesis. I shall forever be grateful to Professor Vogler for the support, inspiration and suggestions throughout the completion of this thesis. Further, I would like to thank Professor Craig Barker for the academic advice rendered during the early stages of the research.

This thesis would not have been possible without the unending patience and constant encouragement of my family. Their generous financial and moral support enabled me to finish this thesis. They will always be in my heart. This thesis is dedicated to them.

I am also grateful to a number of organizations that enabled be complete this thesis. These organizations are: The Commonwealth Scholarship Commission, The Ministry of Justice (Malawi Government), Ministry of Foreign Affairs (Malawi Government), Human Rights Watch, the Open Society Institute, International Association of Prosecutors, the International Bar Association, the International Law Association and The Coalition for the International Criminal Court. Special thanks go to the ICC officers (and former officers) for their invaluable help and suggestions.

Thanks are also due to the friends and colleagues at the University of Sussex's School of Law, Politics and Sociology, in The Hague and New York, my Malawi friends for their support during the PhD study. I offer you my best wishes in future.

ABBREVIATIONS

AC	Appeals Chamber
ACPHR	African Convention of Peoples and Human Rights
ASP	Assembly of States Parties
BSQ	Biographic Security Questionnaire
CICC	Coalition for the International Criminal Court
CoE	Council of Europe
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHRT	European Convention of Human Rights
EHRR	European Human Rights Reports
GAO	Government Accountability Office (USA)
HRW	Human Rights Watch
IAP	International Association of Prosecutors
IBA	International Bar Association
IBAHRI	International Bar Association Human Rights Institute
ICC	International Criminal Court
ICC RPE	International Criminal Court Rules of Procedure and Evidence
ICCPP	International Criminal Court Protection Program
ICCPR	International Convention on Civil and Political Rights
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
INTERFET	International Force East Timor
IRA	Individual Risk Assessment
IRS	Initial Response System
NGO	Non-Governmental Organization
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
OSISA	Open Society Initiative for Southern Africa
OSJI	Open Society Justice Initiative
OTP	Office of the Prosecutor
PrepCom	Preparatory Committee for the Establishment of the ICC

PTC	Pre-Trial Chamber
RNW	Radio Netherlands Worldwide
SC	Security Council
SCSL	Special Court for Sierra Leone
SOCPA	Serious Offences Crime & Proceeds Act (UK)
SFM	Special Fund Model
SFR	Special Trust Fund for Relocation
SPSC	The Special Panels for Serious Crimes in East Timor
SRA	Security Risk Assessment
STL	Special Court for Lebanon
TC	Trial Chamber
UN	United Nations
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
US	United States
VWSS	Victims and Witness Support Section
VWU	Victims and Witnesses Unit
WITSEC	Witness Security Program
WPP	Witness Protection Program
OUP	Oxford University Press
CUP	Cambridge University Press

ABSTRACT

This thesis is a study of non-procedural witness protective measures at the International Criminal Court (ICC). Its aim is to examine policy formulation, legal interpretation and implementation of the ICC's non-procedural witness protective measures from the perspective of policy oriented jurisprudence. The protection of witnesses (procedural or non-procedural) is crucial to the Court's justice mechanism and the concept of witness protection has become firmly entrenched in the legal framework of the ICC. It enables the preservation of the Court's much needed testimony. It further secures the safety, physical and psychological well-being, dignity and privacy of witnesses.

The thesis argues that policy oriented jurisprudence, as a framework of inquiry that approaches international law as a decision-making process, has the potential of offering alternative solutions to the ICC's witness protection system. It argues that such solutions should be systematically considered on the basis of shared interests and the expectations of the world community of states parties to the Rome Statute.

Through this approach, the thesis argues that although the ICC witness protection system exists, its mechanism is not working effectively. Policy formulation, legal interpretation and implementation have been compromised as a result of numerous challenges. These challenges have included lack of coordination, uncertainty and confusion among the ICC's organs, namely the Office of Prosecutor (OTP), the Victims and Witnesses Unit (VWU), the Chambers, and the Defence. Further challenges have included difficulties in the interpretation of the concept of 'appropriate protective measures' and the relocation of incarcerated, infiltrated and polygamous witnesses. Through an analysis of witness protection decision-making by the Chambers, the OTP, the VWU, the Defence and all those collaborating with the Court in the protection mechanism, decision-making regarding law and policy for witness protection is examined in depth on the basis of relevant case law, statutes, rules and practice. The actual practice of the ICC's non-procedural witness protective measures is investigated through a fieldwork project involving a three months period of qualitative research encompassing fourteen (14) elite interviews of the ICC decision-makers involved in the witness protection system at The Hague.

The thesis ends with detailed examination of how current problems with non-procedural witness protective measures could be overcome. This could ensure protection from interference, improved witness support and effective operation of the Court's witness protection system.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND DISCUSSION

The concept of witness protection at the International Criminal Court (ICC) has become an important aspect of the Court's legal and policy framework.[1] Further, successful witness protection program is essential to the proper functioning of international criminal law (ICL). In order to understand this concept within ICL and the Court's structure, it is important to consider the background and development of the ICC framework. The existence and recognition of ICL has its roots far back in human history.[2] Precisely, it was during the end of the nineteenth century and the beginning of the twentieth century[3] that ICL concepts begun to be seriously considered as legal issues.[4] For instance in the 1860s Gustav Monnier, one of the founders of Red Cross Movement, proposed a draft statute for an international criminal court.[5] This was to enable prosecutions of grave breaches of the 1864 Geneva Convention and other humanitarian norms.[6] That notwithstanding, Monnier's proposal was considered too radical for its time.[7] Although initial efforts towards such a court proved unsuccessful, international lawyers were stimulated to devote their attention towards a

1 *See generally*, Eikel, M, (2014) External Support and Internal Coordination – The ICC and the Protection of Witnesses, in Stahn, C, (Ed.) The Law and Practice of the International Criminal Court, Oxford, OUP, pp.1105-1131.

2 Werle, G, Jessberger, F, (2014) Principles of International Criminal Law, Oxford, OUP, p.1; Bassiouni, M, C, (1997) From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court, 10 Harvard Human Rights Journal, p.11.

3 Dinstein, Y, (1985) International Criminal Law, 20 Israel Law Review, pp. 206-207.

4 Bassioiuni, M, C, (2008) International Criminal Justice in Historical Perspective, in Bassioiuni, M,C, (Eds.) International Criminal Law, Volume III, Leiden, Martinus Nijhoff Publishers, p.29.

5 Hall, C, H, (1998) The First Proposal for a Permanent International Criminal Court, 322 International Review of the Red Cross, p.57.

6 *Ibid.*

7 Schabas, W, A, (2011) An introduction to the International Criminal Court, Cambridge, CUP, p.2.

permanent international criminal court.8 Cold-war tension slowed progress until the Berlin war fell.9 Troubled with a huge narcotic and associated transnational criminality, Trinidad and Tobago resuscitated the idea of an international criminal court during the United Nationals General Assembly (UNGA) in 1989: " …when considering at its forty-second session the item entitled 'Draft Code of Crimes Against the Peace and Security of Mankind' to address the question of establishing an international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code of crimes, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote particular attention to that question in its report on that session."10 Recognising the desirability and feasibility of an international criminal court establishment being subject of discussion as far back as before the creation of the Nuremberg Military Tribunal in 1946, the UNGA requested the International Law Commission (ILC) to consider the Trinidad and Tobago proposal.11 The ILC exploited the word "including" in order to make proposals for a Court with much wider jurisdiction.12 The ILC completed its work on a Draft Statute for an International Criminal Court in 199413 paving way for further negotiations on the Draft Statute.14 The events of 17 July 1998 at the Diplomatic Conference

8 *Ibid*, pp. 2-5; Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN. Doc. C547 (I). M384 (I). 1937. V (1938); Draft Convention for the Establishment of a United Nations War Crimes Court, UN War Crimes Commission, Doc. C.50(1), 30 September 1944; Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2135 (1952); Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2645 (1954); Johnson, D, H, N, (1955) Draft Code of Offences Against the Peace and Security of Mankind, 4 International and Comparative Law Quarterly, p.445.

9 Schabas, *Op. Cit*, p.10.

10 Letter Dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary General, UN Doc. A/44/195, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N89/200/53/img/N8920053.pdf?OpenElement, last accessed on 15 January 2016.

11 *Ibid*, annex p.2.

12 Reydams, L, & Wouters, J, (2012) The Politics of Establishing International Criminal Tribunals, in Reydams, L, Wouters, J, Ryngaert, C, (Eds.) International Prosecutors, Oxford, OUP, p.73.

13 Report on the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July, 1994, UN Doc A/49/10, Chapter II, paras 23-41; Crawford, J, (1995) The ILC Adopts a Statute for an International Criminal Court, 89 American Journal of International Law, p.404.

14 Benedetti, F, & Washburn, J, (1999) Drafting the International Criminal Court Treaty: Two Years to Rome and an afterword on the Rome Diplomatic Conference, 5(1) Global Governance, pp.1-37.

of Plenipotentiaries in Rome marking the establishment of the first ever treaty-based[15] permanent ICC which was a huge breakthrough.[16] It gave hope to a world community eagerly wishing to pursue collective humanity needs such as an end to impunity in form of peace, justice and rights for victims of international crimes.[17] The entry into force of the Rome Statute of the ICC (Rome Statute) on 1st July, 2002[18] was the high point of the Rome dream for the "globalization of justice."[19] It was the fulfilment of efforts and processes that had been initiated at the Nuremberg[20] and Tokyo[21] trials and carried forward by the predecessor *ad hoc* international criminal tribunals of former Yugoslavia[22] and Rwanda.[23] Considering its stature, scope, jurisdiction and operational procedures, the ICC can be distinguished from former and other existing tribunals.[24] The unique text establishing the Court was a result of an exceptional compromise of numerous and varied experiences of

15 Signed and negotiated by 160 member states, Rome Statute for the International Criminal Court Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, A/CONF.183/13 (Vol. I) (1998), http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf, last accessed on 24 September 2015.

16 Cassese, A. (2002) From Nuremberg to Rome: International Military Tribunals to the International Criminal Court in Cassese, A., *et. al*. (Eds.) The Rome Statute of the International Criminal Court: A Commentary, Vol. 1, Oxford, OUP, p.3.

17 Broomhall, B. (2003) International Justice and The International Criminal Court: Between Sovereignty and the Rule of Law, Oxford, OUP, p.iii.

18 Schabas, W. (2001) International Criminal Court: The Secret of its success, 12 Criminal Law Forum, p. 415; Yang, L. (2003) Some Critical Remarks on the Rome Statute of the International Criminal Court, 2 Chinese Journal of International Law, p.599.

19Landrum, B.D. (2002) The Globalization of Justice: The Rome Statute of the International Criminal Court, Army Lawyer, p.1.

20 Kelsen, H, (1947) Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? 1(2) International Law Quarterly pp. 153-171.

21 *See generally*, Totani, Y. (2009) Tokyo War Crimes Trial: The Pursuit for Justice in the Wake of World War II, Cambridge, Harvard University Press.

22 Murphy, S.D. (1999) Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia 93(1) American Journal of International law, pp.57-97.

23 Gallimore, T. (2007) The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda, 14 New England Journal of International and Comparative Law, p. 239.

24 As opposed to the international criminal tribunals that emanated from UNSC Resolutions and had limited jurisdiction, the ICC is a treaty based Court with extensive jurisdiction among its states parties and nationals, non-states parties through the UNSC referral.

actors and decision-makers from different legal systems.25 Even though this was the case, the numerous compromises, challenges and heavy criticisms of audacious and diverse positions transcending political and regional groupings, were levelled against the negotiating process.26 The Rome delegates undermined the process with contention and the tendency of lawyers to prefer the values modelled on their national criminal justice systems and institutions.27 Despite this, some commentators such as Gurmendi have asserted that the Rome Statute remains a special document that mirrors appropriate determination from its negotiators and a rich diverse legal culture.28 Deep divisions regarding so many aspects of the Court's establishment have led to its opponents calling it a 'self-defeating Court with unrealistic dreams' 29 and numerous implementation challenges ahead. 30 As it will be demonstrated in the proceeding Chapters, this thesis supports Rosanne's view that it is a poorly drafted statute for an imperfect organization. 31 It is full of inconsistencies and contradictions which can be traced back to the Rome Conference.32 Its negotiating process, organised around an existing rolling text and constant exclusive private meetings for blocs or

25 Kirsch, P. & Holmes, J.T (1999) The Rome Conference on an International Criminal Court: The negotiating process 93(1) American Journal of International Law , pp.2-12; Lee, RS (1999) The Rome Conference and Its Contributions to International Law, in Lee, RS (Eds.) The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, The Hague, Kluwer Law International, pp.1-30.

26 Kirsch and Holmes argue that the main organs of the conference *i.e.* the Committee of the Whole and the Drafting Committee were hurriedly working in parallel with the plenary. Further, there was a multitude of informal working groups and consultations arranged throughout the conference, all reporting directly or indirectly to the Committee of the Whole. All this was taking place concurrently with formal meetings, expanding rapidly to fill all available time including night meetings; Kirsch, P, & Holmes, J.T, *Ibid*, pp.3-4.

27 Crawford, J, (1995) The ILC Adopts a Statute for an International Criminal Court, 89 American Journal of International Law, p.408.

28 Gurmendi, S.A.F (1999) The Process of Negotiations in Lee, RS (Eds) *Op. Cit*, p.220.

29 Goldsmith, J, (2003) The Self-Defeating International Criminal Court, 70(1) University of Chicago Law Review, pp.89-104

30 Nanda, V,P, (1998) The Establishment of a Permanent International Criminal Court: Challenges Ahead, 20(2) Human Rights Quarterly, pp. 413-428; Kaul, H, P, (2007) The International Criminal Court: Current Challenges and Perspectives, 6 Washington University Global Studies Law Review, p.575.

31 Rosenne, S, (2000-2001) Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute, 41 Virginia Journal of International Law, pp.164-180.

32 *Ibid.*

like-minded groups, was detrimental to some nations 33 leading to a vote against the statute.34 The statute involved flagrant breaches of fundamental principles of treaty law,35 the illegal extension of the role of the UN Security Council36 and controversial jurisdiction over nationals of non-state parties.37

Though recognising these defects, the proponents of the Court argued that the Rome Statute was a historical development 38 that would make a significant difference in the real world.39 It is a crucial document that ensured that the future ICC would still serve humanity while reflecting the essential values from the main criminal justice systems of the world. Notwithstanding the promise of Rome, the ICC has experienced antagonism from some states 40 and numerous cross-cutting challenges including those that relate to witness protection and states cooperation. In order to overcome this, it thus became imperative for the Court to develop its own tools, processes and jurisprudence so as not to disappoint the probable expectations, values,41 consonant outcomes42 and responsibilities towards peace,

33 Some nations such as the United States did not belong to any bloc or negotiating group, Washburn, J, (1999) The Negotiation of the Rome Statute for the International Criminal Court and the International Lawmaking in the 21st Centurty, 11(2) Pace International Law Review, p.374.

34 Leigh, M, (2001) The United States and the Statute of Rome, 95(1) American Journal of International Law, pp. 124-131; Wedgwood, R, (1998) Fiddling in Rome: America and the international criminal court, 77(6) Foreign Affairs, pp. 20-24.

35 Orentlicher, D.F, (1999) Politics by Other Means: The Law of the International Criminal Court, 32 Cornell International Law Journal, p.489.

36 Rosenthal, J, (2004) A Lawless Global Court: How the ICC undermines the UN System, 123 Policy Review, p.29.

37 Scharf, M (2001) The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position, 64(1) Law and Contemporary Problems, pp.67-117.

38 Stoelting, D, (1999) The Rome Treaty on the International Criminal Court, 33(2) International Lawyer, pp.613-616.

39 Dicker, R, & Duffy, H, (1999) National Courts and the ICC, 6 Brown Journal of World Affairs, p.53.

40 Kielsgard, M. (2005) War on the International Criminal Court, 8 New York City Law Review, p.50.

41 Schmitt, MN, (1990) New Haven Revisited: Law, Policy and Pursuit for World Order, 1 United States Air Force Academy Journal of Legal Studies, pp.186-187.

42 Reisman, W, M, *et. al*, (2007) The New Haven School: A Brief Introduction 32 Yale Journal of International Law, p.575.

justice and an end to impunity. It is suggested that its early officials and decision-makers[43] had to understand that the Rome Statute was an allocation of values to a new Court. There was need for those involved in the making and shaping of the law to understand their role in that process. For instance, through their conduct of legal interpretation and policy-making, they were expected to accord appropriate protective measures to witnesses. Therefore, to those negotiators at Rome and the adherents of the Rome Statute, the ICC symbolises a commitment to justice processes and determination to end impunity. However, in order to achieve this aspiration, there is a need to appraise the processes involved in the ICC's legal interpretation, policy formulation and implementation. One such crucial process requiring scrutiny is the protection of witnesses. It is one important means to an end as regards the world community dream for international criminal justice values.[44]

1.2 CONTEXTUALIZATION OF THE PROBLEM

The establishment of an effective witness protection regime within the Rome Statute and operated by the Victims and Witnesses Unit (VWU), is fundamental to the functioning of the Court.[45] It is within the mandate of the Court to protect inter alia, victims and witnesses during their contact with the Court or participation in its proceedings.[46] Schiff has argued that the ICC's witness protection regime is a practice adopted from the predecessor criminal tribunals.[47] It is thus a perfected precedent emanating from the International Criminal Tribunal for Former Yugoslavia (ICTY)'s 'Protection of Victims and Witnesses.'[48] Such attempts at improvement has been a continuous learning curve from the experiences of the ICTY's Victims and Witnesses Section (VWS) that had been established to recommend protective measures and provide psychological assistance, and general support to

43 Pre-Trial, Trial and Appeals Chamber Judges, Registrar, OTP officials, Defence lawyers, Victims Representatives, and other collaborators such as NGOs and states parties' officials.

44Ocampo, L.M, (2008) Building a Future on Peace and Justice: The International Criminal Court in Ambos, K, *et. al*, (Eds.) Building a Future on Peace and Justice, Berlin, Springer, p.9.

45 Article 43 of the Rome Statute.

46 Article 68 of the Rome Statute.

47 Schiff, BN (2008) Building the International Criminal Court, Cambridge, CUP, p.131.

48 *Ibid*, Schiff discussing Article 22 of the ICTY Statute.

witnesses.[49] It is the position in this work that Schiff's argument is only correct in part. The origins of ICC's witness protective measures cannot be confined to the ICTY precedent only. The ICTY experience is just one channel that brought the protective measures to the international arena. Further, interpretation of elements of procedural witness protective measures have made reference to concepts of international human rights bodies[50] and progressive development of human rights law.[51] In this instance, considerations have included the need to increase the efficiency of ICC's institutional framework and criminal process,[52] and to balance fair trial rights of an accused person and witnesses.[53] Concerns for witness protection had always been an ongoing concern for national criminal justice systems since the 1970s.[54] This was especially common in serious and organised crime trials.[55] Therefore, contrary to Schiff's claims above, national criminal justice experiences of such witness protection concerns were in the minds of the Rome negotiators. Crawford has

49 Rule 34A (I-ii) of the ICTY RPE.

50 Article 14 of the ICCPR; Article 10 of the UDHR; Articles 6, 8 and 14 of the ECHR; Article 7 of the ACPHR; Article 8(5) of the American Convention on Human Rights; Ruiz-*Mateos v. Spain*, (App. 12952/87), 23 June 1993, Series A No 262, (1993) 16 EHRR 505, para. 63; Amnesty International, Human Rights Committee, African Union, European Union, The Inter-American Commission on Human Rights.

51 Schabas, W, (2008) Rights of An Accused, in Ambos, K, & Triffterer, O, (Eds.) Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article, Portland, Beck, p.1253.

52 Report of the Bureau on the study Group on Governance, ICC-ASP/13/28, 28 November 2014, https://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-28-ENG.pdf, last accessed on 07 May 2016.

53 *Prosecutor –v- Jean Pierre Bemba*, ICC-01/05-01/08, Decision on the "Submission on the remaining Defence Evidence" and the appearance of Witnesses D04-23, D04-26, D04-25, D04-36, D04-29, and D04-30 via video-link, 15 August 2013, para 9, https://www.icc-cpi.int/iccdocs/doc/doc1633440.pdf, last accessed on 07 May 2016; *Prosecutor –v- Lubanga* (ICC-01/04-01/06), Décision relative au système définitif de divulgation et à l'établissment d'un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97, Judge Steiner cited case law of the ECHR in support of her assertions on minimum guarantees for fair trial going beyond the terms of Article 67 of the Rome Statute and the rights of an accused person; *Prosecutor –v- Thomas Lubanga Dyilo*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-108-Corr 30-05-2006 1/24 UM PT, Decision of 19 May, 2006, p.12, https://www.icc-cpi.int/CourtRecords/CR2006_02434.PDF, last accessed on 19 May 2016, where Judge Steiner cited Article 8(5) of the American Convention on Human Rights as enshrining the principle of publicity in criminal proceedings establishing that " criminal proceedings shall be public, except insofar as may be necessary to protect the interests of Justice." The Judge further cited the Inter-American Commission on Human Rights (Annual Report 1992-3, Chapter IV on the Right to Fair Trial, Section G (final observations) on how secret trials may be intended to serve a good purpose of safety, but nevertheless seriously violate guarantees of due process.

54 Slate, R.N. (1997) The Federal witness protection program: Its evolution and continuing growing pains 16(2) Criminal Justice Ethics, pp.20-34.

55 Kayuni, S, & Jamu, E., (2015) Failing witnesses in serious and organised crimes: Policy perspectives for witness protective measures in Malawi, 41(3) Commonwealth Law Bulletin, pp.423-426.

confirmed this in arguing that the Rome Statute was a result of the social engineering and experiences of varied national criminal justice systems that the negotiators represented.56 It is suggested that in addressing the need for witness protection, making it a permanent feature of the Rome Statute, the negotiators were heavily influenced by their diverse observational standpoints57 as regards what the law must represent and their attempts to clarify interests and community goals.58 Further, these were efforts not to hide their prevarications in legal compromise but an attempt to fuse together effectively the tried and tested witness policies of the world community. In asserting the importance of witness protective measures, Mahony has suggested that the protection of witnesses from intimidation or harm is vital to the integrity and success of any judicial process.59 This research will set out the present state of the Rome Statute in terms of governing the ICC's witness protection measures. It is admitted that the Rome Statute, including the Rules of Procedure and Evidence (ICC RPE) and the Court's practice have in most cases considered the protection of both victims and witnesses. That notwithstanding, this research is not about victims before the ICC. It is about witnesses that come in contact with the Court. Only those victims before the ICC, who happen to be witnesses as well *albeit* playing a 'double role', will be considered. The Rome Statute does contain important provisions for witness protection and support. It states that the Court shall take *appropriate measures* to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.60 Pursuant to this, the Rome Statute and ICC RPE provide for split61 responsibilities between different organs of the Court. These are the Chamber (Pre-Trial -PTC & Trial -TC), Prosecutor's Office (OTP) and Registrar's office.62

56 Crawford, J, *Op. Cit*, American Journal of International Law, p.408.

57 Effects of their viewpoints as regards their national justice systems and the law. For a discussion on observational standpoint, *see* M. McDougal, Lasswell, H. & Miller, J. (1967) The Interpretation of Agreements and World Public Order, New Haven, Yale University Press, p.xxii.

58 The aims and objectives of the world community. For a discussion on clarification of world community goals, *see* McDougal III, L.L, (1967) Choice of Law: Prologue to a Viable Interest-Analysis Theory, 51 Tulane Law Review, p. 221.

59Mahony, C.,(2010) The Justice Sector after thought: Witness Protection in Africa, Pretoria, Institute of Security Studies, p.1.

60 Article 68(1) of Rome Statute.

61 Eikel, M.,(2012) Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice, 23 Criminal Law Forum, p.97.

62 Article 68 of Rome Statute.

The Registrar's office through the Victims and Witness Unit (VWU) provides protection, security arrangements, counselling and other appropriate assistance to witnesses at risk on account of their testimony.63 It seeks to secure confidence, coordinate and enable witnesses to be available to the Court without fear of retribution. This can be on request from the OTP, Defence or ordered by the Chambers.64 Notwithstanding this, the ICC faces numerous interpretational, applicability and implementation challenges65 of both policy and legal framework for witness protective measures.

On the basis of legal interpretation of the Rome Statute and its RPE, policy formulations, case law, *travaux préparatoires*, trends and practice considerations of the witness protective measures, this thesis will examine how the ICC has implemented witness protective measures. This research explores "appropriate measures" as a test adopted by the Rome Statute for the purpose of the protection of the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.66 It further explores the challenges relating to uncertainty and confusion over institutional responsibilities67 and how the ICC should handle and relocate witnesses with a particular profile. In analysing the profile of witnesses, this research categorises them into three groups: Firstly, it is a challenge to relocate *infiltrated* also known as *insider witnesses*68 or *dirty hands* witnesses to third party countries as international law does not protect criminals.69 Secondly, *detained or incarcerated* witnesses who due to the nature of their custodial circumstances in the detaining state and upon the

63 Article 43(6) of Rome Statute.

64 Schiff, B,N, *Op. Cit*, p.131.

65 Hansbery, H., (2011) Too Much of a Good Thing in Lubanga and Haradinaj: The Danger of Expediency in International Criminal Trials, 9(3) Atrocity Crimes Litigation Year-In-Review, p.358.

66 Article 68(1) of the Rome Statute.

67 In terms of admittance into witness protection program and preventive relocation. Rome Statute accords responsibility to the Court as a whole in Article 68(1); Eikel, *Op. Cit*, p.99.

68 Those who are themselves suspects of crimes commission. Witnesses who are part of an organization that committed crimes such as low ranking soldiers in an armed group.

69 ICC, (2015) ICC Victims and Witnesses Protection and Support, http://www.icccpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx , last accessed on 30 October 2015.

necessity to testify at The Hague, present the Court with temporary relocation, logistical and cooperation challenges. Thirdly, *polygamous witnesses*70 whose relocation arrangements are complicated due to the likelihood of being refused prospective relocation by a requested host State on the grounds that their personal circumstances breach that State's concept of public order.71

The ICC witness protection problem being considered in this research does not purport to describe conclusively all the substantive trends, practices and procedural processes of the protection system at the Court. Rather, this research seeks to establish how ICC Judges, Prosecutors, Defence and Registrar undertake the decision-making process regarding witness protection and relocation. The main question is whether a policy-oriented approach72 can help in the interpretation of the Court's witness protective measures? Further questions include, what constitutes "appropriate measures"? Whether "appropriate measures" is a satisfactory test? What are the precise boundaries for organ responsibility as regards witness protective measures? Is it possible for protective measures to take into account the circumstances of the witnesses? Every use of authoritative power has some influence, however slight, on the biases and competences that form part of the decision-making process. 73 In agreement with McDougal, Lasswell and Reisman's argument about international law approach,74 the ICC decision-makers should effect influential power, attain the purpose of the ICC and ICL by focusing on serving humanity. The law should be relevant to the needs of not only the decision-makers themselves as specialists in decision, but also all those who would be affected by the processes. Such relevance must at all times

70 UN, (2008) Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime Manual, New York, UNODC, p.82.

71 For instance, Marriage Act Cap. 25:01 of Laws of Malawi does not allow polygamy.

72 As it will be discussed in the proceeding paragraphs of Chapter Two, policy-oriented approach to international law should be understood as decision-making process of ICC actors, participants and observers. These are the decision-makers as regards witness protective measures, *see also* Higgins, R, (1968) Policy Considerations and the international judicial process, 337 Journal of Conflict Resolution, p.354.

73McDougal, M., *et. al*, (1966-1967) World Constitutive Process of Authoritative Decision, 19 Journal of Legal Education, p.257.

74 McDougal, M.S, Lasswell, H.D, & Reisman, W.M, (1967) Theories about international law: Prologue to a configurative jurisprudence 8 Virginia Journal of International Law, pp.191-198.

meet the minimum conditions for a dignified existence and human security. Reisman and colleagues further argue that human dignity considerations are those goals or values that approximate the optimum access by all human beings to all things that they cherish.75 In order to attain the goals of the ICC's witness protection, considerations for decision-making need to relate to support, cooperation and coordination among all actors; safety, health and welfare for witnesses; financial means within the system; easy accessibility to necessary and practical information for decision-making; requisite qualifications and skills for all actors within the system; internal coordination among organs of the Court and partner states party organizations; equality of arms regarding resource allocation and treatment of witnesses among organs of the Court; and proper cooperation strategy with states parties to secure implementation and relocation arrangements.76 Is it possible for ICC's decision-making processes to contemplate aspirations of world community? McDougal argues that any community has aspirations in form of values, clarification of goals and interests that it wishes to attain.77 From the clearly stipulated preamble to the Rome Statute,78 it is suggested that for those world community members or states parties that have ratified and acceded to the Rome treaty, peace, security, well-being, an end to impunity and international justice are regarded as some of the minimum conditions that can contribute to and satisfy world community aspirations. The research will further explore whether 'third party states'79 have a differing understanding of witness protective measures? Should there be a deliberate policy to accommodate witnesses regardless of their circumstances? In attempting to answer these questions, it is suggested that the ICC decision-making processes should consider the following: (i) clarification of protective measures goals; (ii) previous developments in witness protection; (iii) future development projections; (iv) policy alternatives.

75 Reisman, M., *et.al*, (2007) New Haven School: A Brief Introduction, 32 Yale Journal of International Law, p.576; Adherents of human dignity values relate to power, wealth, enlightenment, skill, well-being, affection, respect and rectitude as some of the basic values that can possibly secure minimum conditions for gracious human existence, Chen, L. (2014) An Introduction to Contemporary International Law: A Policy-oriented Perspective. Oxford, OUP, pp.3-14.

76 Kayuni, S, W, (2015) *Op. Cit*, pp. 271-298.

77 McDougal, M.S, (1952) Comparative study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order, 1(1/2) American Journal of Comparative Law, p.24.

78 Preamble to the Rome Statute, *paras* 3 & 11.

79 States that go into cooperation arrangements with the ICC but are reluctant to host any witnesses. They would rather fund the witness protection program for witnesses to relocate elsewhere.

The main contribution of this research is its emphasis on the importance and relevance of witnesses as critical actors to the goals and values of the Court. As it will be demonstrated below, little attention has been paid to the development of scholarship on the role and protection of witnesses.80 This may possibly be because of the confidentiality and integrity nature of the subject. Whether it is investigations or evidence gathering for the purposes of prosecution or defence in trials before the Court, witnesses armed with their testimony, fulfill a crucial role in those criminal processes. They form the heart of every trial including ICC proceedings. Without such witnesses and their testimony, the operational mechanisms of the trials would be dysfunctional, rendering the goals of the ICC almost useless. Further to this, it is hoped that this research can contribute towards modelling national processes for witness protection and cooperation arrangements with the ICC. The Rome Statute provides for states parties to ensure that there are procedures available under their national law for all forms of cooperation and judicial assistance. 81 In extending Antonio Cassese's reference to the shortfalls of the ICTY cooperation mechanism as 'a giant without arms and legs,'82 Jurdi argues that an effective and functioning ICC can only be achieved by the cooperation of states parties.83 The Court is another armless giant in desperate need of state responsibility84 as an arm or limb to its protective measures cooperation strategy.

The decision to protect witnesses involves a process of both procedural and non-procedural protective measures. In order to understand such decision processes, I will endeavour to

80 ICC trials can be likened to serious and organized crime trials. Protected witnesses play a decisive role in the outcome of the proceedings. Scant or little attention has been paid to the practice of non-procedural protective measures. There is need to research on the crucial role that such non-procedural protective measures contribute to the securing the much needed protection during pre-trial and post-trial period.

81 Article 88 of the Rome Statute.

82 Cassese, A. (1998) On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9(1) European Journal of International Law, p.13.

83 Jurdi, NN, (2011) The International Criminal Court and National Courts: A Contentious Relationship, Surrey, Ashgate, pp. 69-71.

84 Demirdjian, A, (2010) Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference, 10 International Criminal Law Review, pp.181-208.

assess the processes that secure the Court's witness protection. I have therefore chosen a policy-oriented perspective, also known as the New Haven School (NHS) approach, to analyse and establish how actors and decision-makers at the ICC could enhance policy formulation, legal interpretation and implementation of witness protective measures so as to surmount the current challenges. From such a perspective, it is possible to systematically demonstrate the interests and expectations[85] of the states parties to the Rome Statute regarding the purposes of witness protective measures and policy. Further, such a perspective has enabled me develop methods that focus on orderly changes in the way the ICC witness protection system is organised, including measures for the physical and psychological well-being of witnesses.

My research revolves around the following three key questions: Firstly, how does witness protection process, practice and implementation operate within the Rome Statute? The central question here is how the decision-making process regarding witness protective measures affects the Court's duty[86] to secure the protection of those that come in contact with the Court on account of their testimony. Secondly, whether the current decision-making process as regards witness protective measures is securing justice and avoiding impunity? Thirdly and finally, what are the possible witness protective reforms to be considered in terms of policy formulation, legal interpretation and implementation within the Court's strategies? Thus the research seeks to develop analytical tools to address changes within the ICC witness protective measures practice that tend to support the goals of human dignity.

The Rome Statute and the ICC RPE provide the mandate for witness protective measures within the Court's practice. Literature and research from both academic and professional arenas have considered the ICC's witness protective measures and cooperation of national institutions from a different angle or approach. The main discussion has centred on the procedural protective measures and how they affect the right to fair trial for the accused

85 Wiessner, S., (2009) Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman, 34 Yale Journal of International Law, p.526.

86 Articles 43 and 68 of the Rome Statute.

person. Little attention has been paid to non-procedural protective measures. Vurmeulen, Fransen and Belde argue from a European Union (EU) perspective that even though states already have possible channels of cooperation among themselves as regards witness protection, substantial differences still exist among national legislations. Further, cooperation strategies with international courts such as the ICC are still lacking, making it less effective and even inadequate as a means for national institutions to respond to contemporary criminality in the fast moving technological environment.87 In recognition of the crucial role that witnesses played during trial proceedings in the *ad hoc* tribunals such as the ICTY, Rydberg projected that the same role would be central to proceedings before the future ICC. He then compared the rules, practices and experiences of the ICTY with the Rome Statute, especially the support and protection of witnesses and the role that the future VWU was likely to play.88 Another dominant discussion as regards procedural protective measures has been its comparativeness,89 due process90 and in-trial witness anonymity.91 Bequri in her analysis of witness protection within the ICC emphasises the importance of the ICC learning from the most experienced *ad hoc* tribunal *i.e.* ICTY in terms of procedural witness protective measures.92 Contrary to Bequri's analysis, it is suggested that there is more to the witness protection jurisprudential experience than just the ICTY. Although the ICTY has

87 Vermeuleu, G, Fransen, B & Belde, J, (2005) EU Standards in Witness Protection and Collaboration with Justice, Antwep, Maklu Publishers, p.13.

88 Rydberg, Å, (1999) Case analysis: The protection of the interests of witnesses–the ICTY in comparison to the future ICC, 12(2) Leiden journal of international law , pp.455-478.

89 C. Kress, (2001) 'Witness in Proceedings before the International Criminal Court: An analysis in the light of comparative criminal procedure', in Fischer, Horst (red.), International and national prosecution of crimes under international law: current developments, Berlin: Berlin-Verl. Spitz, 2001, p.333.

90 Sluiter, G. (2002) International criminal proceedings and the protection of human rights 37 New England Law Review, p. 935; Wald, P.M. (2002) Dealing with witnesses in war crime trials: Lessons from the Yugoslav Tribunal, 5 Yale Human Rights & development Law Journal, p.217.

91 Chinkin, C, M. (1997) Due process and witness anonymity, 91(1) American Journal of International Law, pp.75-79; DeFrancia, C, (2001) Due process in international criminal courts: why procedure matters 87(7) Virginia Law Review pp.1381-1439; Ambos, K, (2012) The first judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive analysis of the legal issues. 12(2) International Criminal Law Review pp.115-153; Leigh, M. (1997) Witness anonymity is inconsistent with due process 91(1) American Journal of International Law, pp.80-83.

92 Bequri, R, (2011) Witness Protection in International Criminal Court, Masters Thesis, Lund University, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2167029&fileOId=2171585, last accessed on 5 October 2015.

made a crucial contribution to the development and jurisprudence of ICC witness protective measures, it was a tribunal that had a very restricted mandate. Further, it operated in different circumstances and had its own unique challenges and experiences. Although policy formulation and legal interpretation would borrow from the *ad hoc* tribunals' experiences, the approaches of the decision-makers and their decision-making processes are likely to be different. The Rome Statute is not exactly the same as the ICTY Statute in terms of the witness protective measures legal regime, focus and goals. The former is a treaty based legal regime with a world community focus while the later was a Security Council (SC) based resolution forming a statute with a focus on events and criminality in the Former Yugoslavia only.

While serving as second Registrar of the Court and in her analysis of the ICC's witness protection practice, Arbia argued that it is the responsibility of the Registry to implement all the non-judicial aspects of the Court's administration.93 These non-judicial aspects included, *inter alia*, protection and support of victims and witnesses, and servicing the Court. She further stated that the judicial aspect of the Court is the responsibility of the judges.94 It will be demonstrated in this research that although the Registrar's office considered the VWU as a non-judicial aspect of the Court's administration, the legal interpretation and policy formulation has been otherwise. Eikel argues that pursuant to the Chamber's interpretation of Articles 43 95 and 68 96 of the Rome Statute, it has been alleged that the VWU has participated in the decision-making processes as regards the granting of witness protective

93 Arbia, S, (2010) The International Criminal Court: witness and victim protection and support, legal aid and family visits, 36(6) Commonwealth Law Bulletin, pp.519-528.

94 *Ibid.*

95 Article 43 (6): The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

96 Article 68 (1) The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

measures.[97] He further states that this has become the practice of the Court.[98] While acknowledging the lack of academic discussion on witness protective measures practice within the Court, he considers only the early practice of the Court and argues that split inter-organ responsibilities as regards protective measures implementation has been a huge challenge leading to uncertainty and confusion.[99] Notwithstanding the grounding of Eikel's arguments in the early practice of the Court, his analysis does little to address the challenges of witness circumstances and states parties' cooperation. As a registrar, Arbia acknowledges that numerous challenges have dogged the Court due to the fact that *appropriate protective measures* pursuant to Article 68(1) of the Rome Statute have to be implemented in either on-going conflict or post-conflict areas. This is where law enforcement structures are generally weak. Further, overall security situation is often subject to sudden changes. In such situations, requests for states parties' cooperation are time-consuming and resource intensive with no guarantees for cooperation.[100] Citing the *Katanga and Ngudjolo Case,*[101] Arbia stresses the importance of close cooperation between the OTP and the VWU. Such process would ensure that witnesses were appropriately protected. Surprisingly, she does not address the relationship of the VWU and Defence in terms of witness protection. Further, relocation is a severe measure that has serious effects and dramatic impact upon an individual as regards uprooting such witness from family, his or her surrounding and resettlement in new environment.[102] She thus justifies relocation as a last resort for the ICC witness protection practice. It will be argued that this very approach of having relocation as a last resort has become a source of serious challenge to the Court, stifling witness security in the process. Arbia touches on the issue of the neutrality of the VWU and balanced treatment of all

97 Eikel, M., (2012) Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice, 23 (1-3) Criminal Law Forum, pp.97-133.

98 Eikel, M, (2014) External Support and Internal Coordination – The ICC and the Protection of Witnesses, in Stahn, C, (Eds), The Law and Practice of the International Criminal Court, Oxford, OUP, pp.1105–1131.

99 Eikel, *Op. Cit*, pp.97-99.

100 Arbia, S, *Op. Cit*, pp.519-520.

101 *Prosecutor –v- Germain Katanga and Ngudjolo Chui*, ICC-01/04-01/07-776 OA7 (AC), Judgment on appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of the Pre-Trial Chamber I, Decision of 26 November, 2008.

102 Arbia, *Op. Cit*, p.521.

witnesses called to testify by both OTP and Defence as participants before the Court.103 That notwithstanding, the work herein aims to demonstrate that this neutrality and close working relationship between the VWU and OTP has possibly resulted in witness protection alienation of the other participants such as the defence.104 It is suggested that this has resulted in not only affecting the right to fair trial for the accused person105 but also affecting the equality of arms106 for ICC organs regarding witness protection resources. Though Arbia discusses costs and responsibility for witness protection in relation to host states and the provisions from Special Fund granted by countries that wish to fund witness protective measures but do not wish to host such witnesses due to other reasons, 107 she fails to demonstrate the challenges that accompany the decision-making processes for negotiations of relocation agreements. Further she fails to assess whether such special fund systems are working and their impact on admission into the ICC's witness protection program. Possibly this could be attributed to the fact that at the time she authored her scholarship, the Special Fund Model (SMF) was in its initial phase. Further contribution to the ICC's witness protection scholarship is Ngane's work which examines the implications of cosmopolitan influences on the functioning of the ICC and their implications for the position of witnesses appearing before the ICC and other tribunals.108 Ngane's work fails to consider the goals of witness protection practice and how the processes leading to such practices matter. In order to understand witness protection practice, it is suggested that an inquiry into the decision-

103 *Ibid*.

104 See Chapter 4 discussion. Both OTP and Defence are supposed to request the VWU to protect vulnerable witnesses. However, when VWU makes its assessment and turns down the request to recommend protection into the Court's protection program, OTP is able to provide protection to its own witnesses. The defence fails to protect its witnesses. This is because the Court allocates minimal resources towards the protection of defence witnesses. Defence section happens to be part of the VWU organ while the OTP is an independent organ. This in the end affects the rights of the both the accused persons and the defence witnesses.

105 Defence is unable to properly prepare for a good defence as some of its witnesses are not willing to come forward due to the fact that they cannot be protected.

106 OTP gets preferential treatment over defence witnesses.

107 Arbia, *Op. Cit*, p.523.

108 Ngane, S.N (2015) The Position of Witnesses before the International Criminal Court, Koninklijke Brill, Leiden.

making process109 is essential. Contrary to Ngane's arguments, it is very unlikely that all human beings belong to a single community based on shared morality.110 Further, the ICC may be a cosmopolitan court111 but has no role as a moral teacher 112 with a universal duty attached by humanity towards witnesses. In summing up the current witness protection scholarship, there is discussion on the challenges of testimony of detained witnesses 113 and their rights being lost in jurisdictional battles between ICC and the host state. 114 This includes *non-refoulement* of witnesses who happen to seek asylum 115 and their protection116 as a shared responsibility in international criminal justice.117 In these works as well, little comes out in terms of decision-making processes that guarantee protection of those witnesses. As indicated earlier this thesis attempts to fill that gap.

Witness protection scholarship cannot ignore the recent report by the University of California, Berkeley, Human Rights Centre (UC Berkeley Report). 118 This report has actually benefitted from, inter alia, access and inside views of what the early protected

109 Higgins, R, (1968) Policy considerations and the international judicial process 17(1) International and Comparative Law Quarterly, pp.58-84.

110 Ngane, *Op. Cit*, pp.12-29.

111 *Ibid*, p.35.

112 *Ibid*, p.67.

113 Wijk, J, & Cupido, M. (2015) Testifying Behind Bars – Detained ICC Witnesses and Human Rights Protection in Stahn, C, (Ed.) *Op. Cit*, pp.1084 –1104.

114 Boer, T, & Zieck, M. (2015) ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host State, 27(4) International Journal of Refugee Law, pp.573-606.

115 Wijk, J, (2013) When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released 26(1) Leiden Journal of International Law pp.173-191.

116 Irving, E. (2014) Protecting Witnesses at the International Criminal Court from Refoulement 12(5) Journal of International Criminal Justice pp.1141-1160.

117 Sluiter, G. (2012) Shared Responsibility in International Criminal Justice: The ICC and Asylum, 10(3) Journal of International Criminal Justice, pp.661-676.

118 Human Rights Centre UC Berkeley, (2014) Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses, Human Rights Centre UC School of Law, Berkeley, https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf , last accessed on 7 October, 2015.

witnesses feel about the measures. It discusses findings from the first interview survey of witnesses that have appeared before the ICC. Thus it is an examination of the attitudes and opinions of 109 individuals ranging from victims to expert witnesses, who testified in the Court's first two trials of *Thomas Lubanga* 119 and *Germain Katanga*. 120 That notwithstanding, the UC Berkeley Report is only about those two cases' experiences and views, in both their pre-trial and post-trial phases. As the report expressly states, this is a systematic glimpse into the world of witnesses before the ICC. 121 It is suggested that although the report is a brilliant insight into, *inter alia*, the arena of witness protective measures, pre-trial and post-trial procedures, security and funding issues, it generally focuses on witness testimony. It comingles witnesses that are within the ICC's protection program (ICCPP) and those that are not. Further, the analysis does not distinguish between victims and expert witnesses. Thus it is submitted that the research herein is very relevant as there has not yet been an inquiry into the decision-making process as regards protected witnesses specifically. Professionally, the International Bar Association (IBA) has prepared a report discussing the ICC's efforts and challenges to protect, support and ensure that the rights of witnesses are preserved. 122 It focuses mainly on obtaining state cooperation; supporting witnesses' practical and psychological needs; preparing witnesses for trial, protecting them from potential threats or interference; the unregulated use of third parties such as intermediaries to liaise with witnesses; the impact of the Court's missing *subpoena* powers; the increased use of video-link testimony and ambiguities over the post-testimony legal status of ICC witnesses at risk. 123 It is submitted that insofar as the report focuses on witness protection and the challenges faced by the ICC, there is a lack of discussion on issues related to processes regarding the welfare of witnesses, decision-making and considerations of the decision-makers when formulating policy, legal interpretation, and implementation of the

119 Case Information Sheet, http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf , last accessed on 7 October, 2015.

120 Case Information Sheet, http://www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf , last accessed on 7 October, 2015.

121 UC Berkeley Report, *Op. Cit*, pp.4-6.

122 IBA (2013) Witnesses Before the International Criminal Court, IBAHRI Trust, London, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4470a96b-c4fa-457f-9854-ce8f6da005ed, last accessed on 7 October 2015.

123 *Ibid*, pp.5-10.

protective measures. Further, the IBA report has a main focus on the ICC's heavy reliance on live witnesses' testimony.[124] It does little to consider witness circumstances and organ responsibilities notwithstanding that these represent some of the most serious challenges to witness protective measures at the moment. Therefore, these stated shortfalls or gaps, require scholarship development to contribute towards an effective witness protection system at the Court. The proceeding section discusses the methodological approach to the thesis in form of library research and qualitative research analysis of data.

1.3 METHODOLOGY

1.3.1 Choice of methods

Qualitative research method can be described as exploratory whereby interpretative approaches are employed in an attempt to understand meanings that people attach to experiences, actions, decisions, beliefs, values, realities and interactions with their social world.[125] The qualitative method of conducting research has proven to be one of the major practices among social science students and researchers[126] in areas such as law and policy. Through it, there is an enrichment of experiments, surveys and research generally.[127] Further, qualitative methodology bridges the gap between those targeted and the researcher. Thus the reason for choosing qualitative research method was to carefully explore[128] and develop insights into the complexities and factor processes for policy formulation, legal interpretation and implementation of witness protection decisions at the ICC. As Clive Seale

124 *Ibid*, p.8.

125 Merriam, S.B, (2002) Introduction to Qualitative Research, in Merriam, S.B. (Eds) Qualitative Research in Practice: Examples for Discussion and Analaysis, San Francisco, Jossey-Bass, pp.3-4.

126 Snape, D, Spencer, L, (2003) The Foundations of Qualitative Research in Ritchie, J & Lewis, J, (Eds.) Qualitative Research Practice: A Guide for Social Science Students and Researchers, London, Sage Publications, pp. xiii-xiv.

127 Bachman, R, Schutt, R.K, (2014) The Practice of Research in Criminology and Criminal Justice, London, Sage Publications, p.236.

128 Snape & Spencer, *Op. Cit*, p.xiv.

argues, qualitative research methods enable flexible and creative inquiry129 that stimulates conversations for further development of emerging practice. Denzin and Lincoln have noted that, mostly qualitative research attempts to interpret actions, decisions, beliefs or values in terms of the meanings people bring to them.130 This is an attempt to make sense of a particular social situation, intention, event, role or group.131 Qualitative research employs diverse methods of collecting data. That notwithstanding, this research opted for a qualitative method of study through a simple elite interview questionnaire132 addressed to ICC officials, NGOs cooperating with the Court and donors contributing towards witness protection funding. It is suggested herein that elite interviews are relevant for the purposes of determining the ICC witness protection practice through organs such as the PTC, TC, AC, the OTP and the VWU. Further, there is need to consider the opinions of donors and non-governmental organizations cooperating with the Court as their work impedes on the successful implementation of such measures. Considering the sensitivity and integrity of the issues regarding these protective measures, trust was supposed to be gained through confidential and anonymous interviews. In addition to strategies for such elite interviews,133 and considering that the production of new knowledge is fundamentally dependent on past knowledge,134 library research is central to the thesis. This has been used as an additional data gathering strategy through analysis of publicised statements made by professional practitioners, policy documents of the Court, ICC RPE and internal regulations.135That

129 Seale, C, (1999) The Quality of Qualitative Research, London, Sage, p.26; Sieber, J.E, (1982) The Ethics of Social Research: Surveys and Experiments, New York, Springer-Verlag, p.182.

130 Denzin, N, & Lincoln, Y. (2000) Handbook of Qualitative Research, Sage, London, p.3.

131 Creswell, J. (2003) Research Design: Qualitative, Quantitative, and Mixed Methods, London, Sage, p.198.

132 It is easy to use and very practical as large amounts of information can be collected within a short period, easily quantified, analysed more scientifically and objectively; Brenner, M., (1981) Patterns of Social Structure in Research Interview in Brenner, M(Ed.) Social Method and Social Life, London, Academic Press,p.117.

133Harvey, W.S.,(2011) Strategies for Conducting Elite Interviews, 11(4) Qualitative Research, pp.431-441.

134 O' Leary, Z., (2004) The Essential Guide to Doing Research, London, Sage, p.66.

135 Sources mentioned in Article 38(1) of the International Court of Justice (ICJ) supported by modern international law recognised sources as subsidiary means, Draft Codes of the International Law Commission (ILC), the work of international bodies, and judicial decisions or case law will also be useful documented knowledge; Subsidiary means like Draft Codes "may reflect legal considerations largely shared by the international community, and they may expertly identify rules of international law, but they do not constitute state practice relevant to the determination of a rule of customary international law, *see Prosecutor –v-*

notwithstanding, it has to be noted that this thesis sharply departs from the distinction between primary sources of international law namely treaties, customs and general principles on the one hand and subsidiary means for the determination of rules of law namely judicial decisions and doctrine on the other. It is suggested that the said contrast between primary sources and subsidiary means does not fully mirror the realities of decision-making, application and implementation of international criminal law.136 Sometimes national and international judgments can be cited as independent authorities.137 To sum up, qualitative methodology ensures that knowledge is clearly interpreted and realistically built up and described138 from dialogue between the one conducting the researcher and the one being interviewed.139

1.3.2 Field Work

Being a recent and specially designed140 international institution, I chose the ICC because it is a far reaching institution. It is focused on delivering international criminal justice as its main objective. For such objective to be achieved, the Court involves various international actors, decision-making processes and pursuit for the betterment of witness welfare as instrumental to the justice processes. Initially, I decided to focus only on the ICC actors that are involved in decision-making regarding witness protection namely, the OTP, VWU, Defence, and Chambers. As I was about to embark on the fieldwork, I realised that opinions

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Vasiljevic, IT-98-32-T, ICTY, 29 November, 2002, para. 200, http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf, last accessed on 13 October 2015.

136 Ferdinandusse, W (2006) Direct Application of International Criminal Law in National Courts, The Hague, Asser, p.6; *Ibid*, on the primary sources of international law.

137 For instance, the R-*v-Bow Street Stipendiary Magistrate and Others, Ex. Parte Pinochet Urgarte (Amnesty International and Others intervening) (No. 3),* [1999] 2 WLR 827 (HL) (*Pinochet Case)*, which was extensively cited by Belgium in its oral pleadings before the ICJ in the *Case Concerning the Arrest Warrant* of 11th April, 2000 (Democratic Republic of Congo –v-Belgium) No. 121, ICJ Judgment, 14 February, 2002 (the *Arrest Warrant Case)*; *see also* Nollkaemper, P., (2003) Decisions of National Courts as Sources of International Law: An analysis of the Practice of the ICTY in Boas, G. &. Schabas, W. (Eds.) International and Criminal Law Developments in the Case Law of the ICTY, Martinus Nuhoff, Leiden, p.277.

138 Denzin & Lincoln, *Op. Cit*, p.3.

139 Kvale, S, (1996) InterView: An Introduction to Qualitative Research Interviewing, London, Sage, p.14.

140 Treaty based institution.

of actors such as NGOs cooperating with the Court and donors funding witness protection initiatives would add independent opinions, considerable value and enrich my research. Considering that almost all my actors are based at The Hague, I decided to conduct my fieldwork there.

As Kezar notes, conducting elite interviews needs considerable thought, planning and focus as regards gaining access, appropriate interview formats or developing rapport.141 I initially planned to apply and undertake an internship programme at the ICC. This was going to easily enable me access the organization and its cooperating partners. Just as Tonner argues in his work, qualitative research doesn't always go according to plan as circumstances may change.142 I was not successful with my application for the internship programme. The reason given was that I had already interned at the Court in 2011. Goldstein has argued that it is pertinent for a researcher to take advantage of any points of access that one has.143 I therefore decided to effect my second plan of access, namely contacting those officers that I had still kept in touch with since my internship experience at the Court. Such officers would, I hoped, lead to others in a snowballing fashion144 and circumstances referring me to their relevant colleagues within the witness protection area. While awaiting responses from these contacts at the Court, I prepared myself for the fieldwork by reading widely. Such reading included academic textbooks and journal articles. I also considered long published reports by professional bodies including those of the IBA and the Berkeley Human Rights Centre on the witness protection history, development to the international arena; and the current practice investigation and prosecution strategies through case law.145 Further, I also had to attend

141 Kezar, A, (2003) Transformational elite interviews: Principles and Problems, 9(3) Qualitative Inquiry, pp. 395-415.

142 Toner, J. (2009) Small is not too small: Reflections Concerning the Validity of Very Small Focus Groups (VSFG), 8(2) Qualitative Social Work, pp.179-181.

143 Goldstein, K. (2002) Getting in the door: Sampling and completing elite interviews 35(4) Political Science & Politics, pp.669-672.

144 Biernacki, P. & Waldorf, D. (1981) Snowball sampling: Problems and techniques of chain referral sampling, 10(2) Sociological Methods & Research, pp.141-163.

145Case law included the following: 1.Situation in the DRC (a) Thomas Lubanga Dyilo, ICC-01/04-01/06, (b) Bosco Ntaganda, ICC-01/04-02/06, (c) Germain Katanga, ICC-01/04-01/07, (c) Mathieu Ngudjolo Chui, ICC-01/04-02/12, (d) Callixte Mbarushimana, ICC-01/04-01/10; 2. Situation in Uganda, Joseph Kony and Vincent Otti, ICC-02/04-01/05; 3. Situation in CAR, (a) Jean-Pieere Bemba Gombo, ICC-01/05-01/08, (b) Jean Bemba

training workshops, read and understand how to conduct elite interview research and questioning. Throughout this time and considering the doctoral workshop trainings I had during the early stages of the DPhil programme,146 I settled for 18 elite interviews as a reasonable number for such an exercise. I further prepared all interview processes including informed consent letters for those to be interviewed and recording device. I only embarked on the fieldwork during my second year and upon getting my ethical approval from the Doctoral School.

During the course of my preparations, I realised that the failure to get the ICC internship was not going to be the only problem I would face during the fieldwork process. A few other problems occurred. The delayed responses from The Hague as to when it would be possible to travel and conduct the interviews was very much of a worry. Further, those contacts that had accepted to help with the interviews were offering varied timelines that made my visa processing and travel arrangements consolidation problematic. I further felt like I was losing control of the project considering that the elite interview subjects were worried about the integrity and sensitivity of their professional positions in relation to the subject being researched. Possibly, as Ostrander argued, greater knowledge of those elites facilitated a challenge to their position.147 It further complicated their participation. In addition, the research was in some instances viewed as intrusive to some elite individuals who preferred to avoid all outside scrutiny148 of their personal area of witness protection.149 Apart from their

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Gombo, Aime Musamba, Kabongo, Babala and Arido, ICC-01/05-01/13, 4. Situation in Kenya, (a) Wiliam Ruto and Joshua Arap Sang, ICC-01/09-01/11, (b) Uhuru Kenyatta, ICC-01/09-02/11, (d) Walter Barasa, ICC-01/09-01/13, (d) Francis Muthaura, ICC-01/09-02/11; 5. Situation in Libya, Saif Al- Aslam Gaddaffi, ICC-01/11-01/11; 6. Situation in Cote d'Ivoire, (a) Simone Gbagbo, ICC-02/11-01/12, (b) Laurent Gbagbo and Charles Goude, ICC-02/11-01/12; 6. Situation in Darfur, Sudan, (a) Ahmad Haru and Ali Abd-Al-Rahman, ICC-02/05-01/07, (b) Omar Al Bashir, ICC-02/05-01/09, (c) Bahar Garda, ICC-01/05-02/09, (d) Abdallah Nourain, ICC-02/05-03/09, (d) Abdel Hussein, ICC-02/05-01/12.

146 Walters, M, (2013) Qualitative Interviewing Presentation Slides,

https://studydirect.sussex.ac.uk/course/view.php?id=25343&topic=1, last accessed on 14 October, 2015.

147 Ostrander, S.A. (1993) 'Surely You are not in this Just to be helpful' Access, Rapport, and Interviews in Three Studies of Elites, 22(1) Journal of Contemporary Ethnography, pp.7-27.

148 Monahan, T, & Fisher, J.A. (2015) Strategies for Obtaining Access to Secretive or Guarded Organizations, 44(6) Journal of Contemporary Ethnography, pp.709-736.

149 The fieldwork was being conducted at the stage when the ICC was under serious scrutiny for the loss and death of numerous witnesses especially on the Kenya Situation or cases.

conscious sensitivities about the subject being researched on, ICC officials were overly apprehensive due to the witness protection struggles that were currently going on in *Pierre Bemba Gombo Case 150* and *Uhuru Kenyatta Case*. 151 Despite assurances about the boundaries of the interviews and semi-structured questions furnished in advance, some officers emailed back that they could not undertake such interviews as they were not sure how far their positions and operations of the ICCPP would be compromised. I had to be persistent in some aspects and it did pay off in some ways. In others I had to employ research accessibility strategies such as professional conference networking152 where I managed to explain my research and conduct interviews on the side-lines. Another strategy I employed for accessibility was finding names and making cold calls and emails.153 Though this was an uncomfortable and difficult approach, it proved to be effective for some two interviewees I could not easily access because of some gatekeepers at the Court. That notwithstanding, I only managed to conduct 14 of the planned 18 interviews. This was done in a space of 4 months with trips to and from The Hague. Due to the nature and sensitivity of the subject, all the 14 interviewees indicated their reluctance to be recorded. As a result, my research journal or notebook became the most important tool, as I had to take down whatever they were saying *albeit* in short form at times. This to a certain extent was problematic since I could not easily quote them *verbatim*. Usually the paraphrases or short form of what they were actually talking about was useful. Further, there were some instances where I was asked not to write down some off-the-record comments explaining the difficulties that the ICCPP was going through. Using such information in this thesis would only be unethical and compromising for the ICCPP. From the questions I was asking them and their responses which I wrote down in the note-book or journal I was able to be alive to and open minded about their ideas and not focus on my own ideas, views and opinions that I had conceptualised prior to embarking on the fieldwork. I needed to retain an open mind, avoid my prejudiced views and beliefs about the workings, failures and shortfalls of the ICC. I therefore had to be conscious to the fact that my own opinions were likely to influence the way I gathered my data and analysed it. In order to achieve this, I needed to continuously go through my notebook or journal and

150 There were witness tampering and intimidation allegations.

151 The prosecution had lost a number of crucial witnesses due to intimidation, murder and corruption.

152 Monahan, T, & Fisher, J.A, *Op. Cit*, p.6.

153 *Ibid*, p.8.

highlight points, make comments on insights, how I could extract more information and better formulate follow-up questions. This was so to maximise the value of the interviews and to further my research. As it will be argued in Chapter 4, my research journal or notes and insights profoundly informed my understanding of witness protective measures practice, trends and challenges within the Court.

1.3.3 Semi-structured and in-depth interviews[154]

In this research, I settled for semi-structured interviews because of their informal conversational approach.[155] They tend to capture the perspectives of the person giving inside information. They have no predetermined set of questions.[156] By leaving questions open ended and others not,[157] semi-structured interviews strike a balance between structured and unstructured conversations.[158] While unstructured qualitative interviewing has the risk of being a 'run-away' interview with no control over the questions, answers and direction,[159] semi-structured interviews accord the control by me as a researcher over specific topics I would like to cover but at the same time hear the interviewee's perspectives or story. Structured interviews are therefore a broad, open ended and holistic approach to questioning leading to non-limitation of the interviewees' choice of answers, approach to the question and how far to go with its stretch.[160] In such an atmosphere, the discussion between the interviewer and interviewee enables the interviewer make use of indications or hints and

154 The respondents and I were engaged in a formal interview. I had initially developed a list of open-ended questions for purposes of guidance on the witness protection topic that needed to be covered during the conversation. However, as I followed the guide, I was able to follow topical trajectories in the conversation that could stray from the guide when I felt it appropriate.

155 Byrne, B, (2004) Qualitative Interviewing, in Seale, C (Ed) Researching Society and Culture, pp. 207-222.

156 Crabtree, B. F. & Miller, W. L. (1999) Depth Interviewing in Crabtree & Miller (Eds.) Doing Qualitative Research, Thousand Oaks, California, Sage, pp.89 -101; Patton, M. Q. (2002) Qualitative research & evaluation methods, Thousand Oaks, California, Sage Publications.

157 May, T, (2001) Social Research: Issues, Methods and Process, Buckingham, Open University Press, p.123.

158 Srivastava, A. & Thomson, S.B. (2009) Framework analysis: a qualitative methodology for applied policy research, 4(2) Journal of Administration and Governance, p.75.

159 Rubionet, S.E (2011) How I Learned to Design and Conduct Semi-Structured Interviews: An Ongoing and Continuous Journey, 16(2) Qualitative Report, p.564.

160 Gubrium, J. F. & Holstein, J. A. (2002) From the individual interview to the interview society, In J. F. Gubrium, J.F, & Holstein, J.A (Eds.) Handbook of Interview Research, London, Sage Publications, pp. 2 -34; McCracken, G. (1988) The long interview, Thousand Oaks, California, Sage Publications.

prompts that help in directing the research topic area into an in-depth or detailed data set.[161] In the end, this approach allowed me to collect a lot of information and perspectives from a small number of interviewees about different understandings of the subject.[162] Through semi-structured interviews, I was able to build a complex and holistic picture of the qualitative research as the words, explanations or detailed views of the interviewees can be analysed in reference to their natural setting.[163] The flexibility of the technique of semi-structured interviews is ideal for elite interviewees involved in running communities or institutions such as actors at the ICC, considering that there is possibly only one opportunity to access them.[164] Therefore, as Fontana and Frey argue, the flexibility in interviewing technique can be useful for reform within the area being researched.[165] From an empathetic angle, I had hoped that as a researcher taking an ethical stance[166] in favour of improving the environment of decision-makers and witnesses affected by their decisions, the research would advocate for policies and legal interpretation that help confront the challenges. Further, this is also ideal for easy understanding of their crucial role in policy formulation and decision-making for the institution they represent or collaborate with. It is suggested that this is so because as elites, their standpoints, roles and context within the institutional structures they represent sit at a critical juncture where law and politics converge. Thus 'politics of law and order' in such institutions avails a key to the understanding of both the political and social context of the policy-making processes.[167]

161 Creswell, J. W. (2013) Research design: Qualitative, quantitative and mixed methods approaches, Sage, London, pp.183–214.

162 Bernard, H, R. (2000) Social Research Methods: Qualitative and Quantitative Approaches, Sage, London, p.191.

163 Cresswell, J.W. (1998) Qualitative Inquiry and Research Design: Choosing Among Five Traditions, Sage, London, p.15.

164 Bernard, *Op. Cit*, p.108.

165 Fontana, A, & Frey, J.H, (2008) The Interview: From Neutral Stance to Political Involvement in Denzin, N.K & Lincoln, Y.S (Eds.) Collecting and Interpreting Qualitative Materials, London, Sage, pp.115-117.

166 *Ibid*, p. 117.

167 Jupp, V, & Davies, P. (2000) Doing Criminological Research, London, Sage, p.176.

During the data collection stage, the integrity and sensitivity of the subject made me realise that I had to be open and demonstrate sensitivity to new ideas and suggestions. My interviewees were chosen for several reasons. The basis for each interviewee was a person or actor who was familiar with witness protective measures at the Court. Further, I focused on those involved with or who had experience in witness protective measures decision-making processes. These were either actors working at the ICC, individuals or NGOs that were collaborating with the Court on witness protective measures. I had an initial list of prospective interviewees that I thought would help with the research. I emailed and called some of them introducing myself and the nature of my research. Most of those willing and eager to help asked for the semi-structured questionnaire to be sent in advance, others wanted to see how the consent form had been drafted and whether it fully protected them and their work. Still others asked for the ethical approval letter from the University's Doctoral School. Despite sending the said documents, some were sceptical due to the topic and its nature. They only accepted after my meeting them in person and assuring them about the anonymity of the interview, including the freedom to withdraw from participation at any given time during the process, or asking for their transcript not to be used for any analysis whatsoever. Interviews with investigators and legal officers at the Court gave me a catalyst for further in-depth interviews on how collaboration was working with individuals and NGOs who not being ICC employees have an independent and 'outsider' perspective of the Court's witness protection operations. Dependent on their varied roles and the Court organs they represented, insights from both 'insiders' and 'outsiders' of the Court furthered my questions and curiosity in every succeeding interview. At the end of each interview, I asked for any reference to those working within the same area who would enhance my research. Some kindly recommended their colleagues insofar as there was no prejudice to their work or to the witness protective measures. Others refused on the basis that it was too sensitive a topic and potentially prejudicial to their contacts. Considering ethical issues, sensitivity and confidentiality of the subject, all the interviewees were assured of anonymity. In order to avoid indirect identification of interviewees through the details and information that they disclosed, I had to assign them alphabetical letters as an identifying tool. The key as regards their details was set in handwritten form and kept separately in order to minimise any online or technological accessibility. Their identity and details[168] whatsoever would not be disclosed in the thesis

168 Personal information or identifiable information which when used alone or combined with other available information can lead to indirectly identifying the interviewee *i.e.* specific work details, period of experience and

and there would be complete protection. Upon typing my notes into separate transcripts, I emailed back for approval to only those interviewees who had insisted on a copy of the typed transcripts. This was to confirm if at all such transcripts represented a true reflection and description of what transpired during the interview. Further, the same were to confirm that the contents of such transcripts did not in any way compromise the ICCPP.

Patton has argued that the quality of information obtained during interviews is largely dependent on the interviewer.169 Pursuant to this, I initially assured myself that recording data would assure maximum quality of information from the semi-structured interviews.170 However, as Barribal and While noted, during fieldwork it is impossible for researchers to always control or plan the circumstances under which a research project takes place, interviewee's friendliness, manner of responses and conditions attached to an interview.171 During my fieldwork, my interviewees refused to be recorded. Reasons included preservation of integrity of their jobs, the witness protection system and the Court itself. Some expressly stated that the very nature of the subject required a very cautious approach. I therefore had to take notes throughout. In some cases, it was short notes that would be perfected later including important lines and phrases that were inspiring. Yin argues that though seemingly informal, 'jottings' or initial field notes should follow a certain pattern. 172 I therefore devised a pattern whereby I tackled questions from general to particular points in bullet format. This is so because such note taking needed to make sense at the end of the research and provide reference for analysis purposes later.

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how long they have worked for the ICC, specific cases they have handled, places they have travelled to on duty and dealings in those places.

169 *See generally*, Patten, M.Q. (1990) Qualitative Evaluation and Research Methods, Sage, Newbury Park.

170 Burgess, R.G, (1991) Field Research: A Sourcebook and Field Manual, Cambridge, Routledge, p.107.

171 Barribal, K. l, & While, A, (1994) Collecting Data Using a Semi-Structured Interview: A Discussion Paper, 19 Journal of Advanced Nursing, p.332.

172 Yin, R.K. (2010) Qualitative Research from start to Finish, London, Guilford Press, pp.161-162.

From this exercise and upon completing the fieldwork, helpful insights, discussions and advice from supervisor Professor Richard Vogler,173 enabled me to proceed with strategy towards analysis of the data collected. I chose thematic analysis of data because it focuses on identification of pattern meaning. 174 This could be living or behaviour across a dataset.175 Through a semantic approach176 to thematic analysis, it was easy for me to combine and catalogue components, ideas, fragments and experiences of the ICC actors. This made such ideas more meaningful than viewed in isolation. I first had to *familiarise myself with all the data*. This included critically reading now and again the information before me so as to become familiar with its content. I later on had to *code* the data. Recognising that a combination of both manual and computer assisted methods of analysis is likely to achieve better results,177 *Nvivo* coding software became a useful tool178 only for purposes of managing the data, providing a set of tools that were to assist in undertaking the analysis.179 I was able to generate labels or codes that identified important features of the fieldwork results. These labels were to help me answer the relevant research question. Upon coding, I had to *search for themes* within the codes or labels that had similar patterns or meanings. It was a search for potential themes and *reviewing themes* against the dataset, refining them so as to be sure they answer the research question. I later had to *name those themes*, developing a detailed analysis of each theme, its scope and focus and how that relates to the witness protection research being undertaken. Lastly, I had to *write up*,

173 At this stage I only had one supervisor. My other supervisor, Professor Craig Barker had left for another university. The process of appointing a second supervisor was still in session.

174 Aronson, J. (1994) A Pragmatic View of Thematic Analysis, 2(1) Qualitative Report, pp.1-3.

175 *Ibid.*

176 Coding and theme development that reflects the explicit content of the data.

177 Welsh, E, (2002) Dealing with data: Using NVivo in the qualitative data analysis process 3(2) Forum Qualitative Sozialforschung/Forum: Qualitative Social Research, Art. 26, http://nbn-resolving.de/urn:nbn:de:0114-fqs0202260.

178 NVivo is a software package used to aid qualitative data analysis designed by qualitative social research. Its full titile is NUD. I ST Vivo. In this thesis NVivo is referred to NVivo 10 version of the software; *see also* Basit, T, (2003) Manual or Electronic? The Role of Coding in Qualitative Data Analysis 45(2) Educational Research, pp. 143-154; Dixon, H, (2014) Qualitative Data Analysis Using Nvivo, Slides Presentation, http://www.slideshare.net/HelenDixon1/qualitative-data-analysis-using-n-vivo last accessed on 18 October, 2015.

179 Bazeley, P, & Kristi, J, (2013) Qualitative data analysis with NVivo, London, Sage Publications Limited, p.2.

interweaving the analytic narrative and data extracts, grounding it in the earlier on existing literature on witness protective measures.

1.3.4 Ethical issues in qualitative research

Throughout the work on this thesis, ethical considerations have always been an influencing factor. Birch and Miller have argued that ethical questions in the research relationship, use of data, interpretative and analytical processes have all become very relevant to qualitative research and continue to change the research landscape.180 I therefore decided to be alive to all ethical considerations elating to my research. During this research and in agreement with Israel and Hay's scholarship on ethics in research, I was keen on making sure that all ethical considerations that can ably promote the integrity of this work were taken care of.181 Fully informed consent,182 mindful professional and occupational responsibilities183 are some of the ethical values that a researcher needs to bear in mind in order to preserve the interests of the participants in the research. I had to be very frank or open and clear about the goals of my research including issues of ethics, securing participants' informed consent before a participant could take part,184 withdrawal at any point they wished to without prior notice or reason given, sensitivity, integrity and confidentiality of the subject. I was of the view that this approach would gain their trust and full participation. At the end of the fieldwork and transcription, participants' contribution was coded and anonymity was assured and secured through removal of any material during publication or writing that would easily identify such participation or the direct nature of their occupations, division or department. Such a promise

180 Birch, M, Miller, T. *et. al*, (2012) Introduction to Second Edition in Miller, T. et. al, (Eds.) Ethics in Qualitative Research, London, Sage, p.2.

181 Israel, M, & Hay, I, (2006) Research Ethics for Social Sciences: Between Ethical Conduct and Regulatory Compliance, London, Sage, p.5.

182 Miller, T, & Bell, L, (2012) Consenting to What? Issues of Access, Gate-Keeping and 'informed' consent in Miller, T, (Eds.) *Op. Cit*, pp. 61-75.

183 Bell, L, & Nutt, L, (2012) Divided Loyalties, Divided Expectations: Research Ethics, Professional and Occupational Responsibilities, in Miller, T, *et, al*, (Eds), *Op. Cit*, pp. 76-93.

184 Oliver, P, (2003) The Student's Guide to Research Ethics, Mainhead, Open University Press, pp. 27-29.

for anonymity and confidentiality enabled me to reach across and gather in-depth data185 while truly encouraging the interviewees to have a free, objective and confident participation.

1.3.5 Limitations

Notwithstanding my respect for the methodological approach outlined above, there were inevitably numerous limitations or disadvantages that had an impact on this thesis. The main limitation of this research was the non-availability or access to the actual witnesses themselves. Decision-making by actors at the ICC or their collaborating partners do eventually impact on the circumstances of such witnesses. It is therefore imperative that their experiences could add value to the research. Due to the nature, integrity and sensitivity of the subject, there was no possibility of accessing protected witnesses. No alternative approaches to obtain witness views were explored.186 It is admitted that to a certain extent, this witness accessibility limitation has consequences on this research, as I am unable to analyse the opinions of the actual witnesses regarding the decision-making processes of ICC's witness protection system. It is my considered opinion that the nature of the research was already risky. Further, compromising the position of witnesses or their safety is unacceptable, no matter how minimal or slight the risk is. Heavy reliance had to be placed on the information provided by those handling them or those making decisions that affect them. Another critical challenge was the reluctance and at times refusal of the participants in some cases to answer any questions they considered intrusive on the ICCPP or had the potential of compromising witness security and circumstances. For instance, some participants could not state which countries witnesses had been relocated to, how many witnesses are in the ICCPP, how many witnesses had walked out of the ICCPP and how much of the annual budget goes into witness protection alone. It was thus difficult in some cases to have a conversation on the confidential nature of the admission processes that ICCPP follows. Further to this, some participants or interviewees gave me challenging time-lines for interviews. They did not actually have the planned and requested forty-five (45) minutes at my disposal. This was due to unforeseen exigencies of their work. This often led to some very short interviews. Further to that

185 Rubin, H, & Rubin, I.S. (2012) Qualitative Interviewing: The Art of Hearing Data, London, Sage, p.xv.

186 Such as sending a questionnaire to the witnesses through the ICC agents that handle them as I was advised by ICC officials that there is no way of contacting witnesses who are relocated in various unknown countries.

considering that there were no recordings allowed, such short interviews made it even more difficult to strike a balance between listening and actual note taking. This in the end presented challenges as regards transcription and analysis of the data.

1.4 STRUCTURE OF THESIS

The thesis consists of six chapters. This chapter is the introduction, an outline of the rationale, the main or overarching questions, research methodology (research strategy; the process of data collection; choice of data collection tools; validity and reliability of the tools; strategies for data analysis and interpretation; ethical issues and study limitations). It sums up with the organizational structure of the thesis.

Chapter 2 introduces the theoretical framework of the study. It firstly analyses what policy-oriented jurisprudence is all about and its approach to international law perspectives. Secondly, the chapter analyses the debates or critics of the jurisprudence from an international law perspective. These main critics come from theoretical positivism, critical legal scholars, law and economics and feminism. In analysing the current witness protection operational challenges at the Court, the Chapter sums up justifications as to why policy-oriented jurisprudence is a suitable international law perspective for this study.

Chapter 3 considers, reviews and traces the genesis of witness protection. It firstly analyses witness protection development in both accusatorial and inquisitorial criminal justice systems. It further discusses two categories of witness protective measures namely procedural and non-procedural protective measures. Considering the magnitude of both systems, the chapter only selects a few dominant examples of witness protective measures practice in some criminal justice systems. The chapter further extends its witness protective measures analysis to international criminal tribunals of Rwanda, Former Yugoslavia, Sierra Leone, Cambodia, East Timor and the recently established Special Tribunal for Lebanon. In the process, the chapter highlights the witness protective measures challenges that have been experienced by both adversarial and inquisitorial criminal justice systems. It further analyses how internationalised tribunals while attempting to improve on weaknesses of the national justice systems experienced their own unique challenges of protecting witnesses.

Chapter 4 discusses the trends and practice of witness protection at the ICC. This begins with a discussion of the *travaux préparatoires* to Rome Statute and how they came into being Articles 43 and 68 of the Rome Statute. The existing literature was further analysed in order to identify empirical findings in the form of the views and opinions of a few sampled actors and decision-makers at the Court including those working closely with the court. This was in relation to decision-making on policy formulation, legal interpretation and implementation of both procedural and non-procedural witness protective measures. Such discussion includes several challenges that have and are still being experienced by the ICC.

In Chapter 5, recommendations and suggested policy and legal interpretational reforms that need, in my view, to be seriously considered by the ICC, were presented. It is hoped that the decision-making processes can be improved so as to ameliorate the circumstances of the witnesses. Suggestions relate to possibilities of pursuing a policy-oriented jurisprudential approach to international law where fulfilment of the promises, dreams and values of world community members of the Rome Statute can be achieved. In order to secure safety and protection of all those witnesses that are at risk due to account of their testimony and contact with the Court, suggested priority themes, goals or values termed *protective codes* have been identified from the synthesis of empirical findings and existing literature on witness protection. They represent human dignity and public order tenets for the witness protection at the Court. These protective codes have been put forward by this thesis as values that the framers of the Rome Statute expected the ICC to strive for. Through the functional analytical method of policy-oriented jurisprudence, it is suggested that such goals will secure and postulate aims of safety and protection for those whose lives are at risk due to account of their testimony and contact with the Court.

Chapter 6 concludes the thesis. In this chapter, I summarise and highlight the main findings of the study. Further, the chapter brings the different strands of the thesis discussion and reflect on the Court's approach that can not only ameliorate the current witnesses' circumstances but also enable a balanced and improved states cooperation, an end to impunity, and justice for both witnesses and fairness for the accused persons. Such postulated goals through adjudication of witness protective measures can bring about world public order of human dignity, a cherished value by the community members of the Rome Statute.

CHAPTER 2
THEORETICAL FRAMEWORK

2.1 INTRODUCTION

Protection of witnesses from intimidation or harm is imperative to the integrity and success of any judicial process.187 The Rome Statute and the RPE provide for appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.188 As highlighted in Chapter one introducing this thesis, these guarantees are qualified by numerous interpretational and applicability challenges in respect of both policy and law.189 These difficulties have ranged from little, or lack, of internal cooperation190 among the different organs of the Court *i.e.* the Chamber, OTP and VWU, external cooperation with states parties, cooperating organizations, and financial difficulties. In the end, these challenges have made it increasingly difficult for the Court to fulfil the intention of the framers of the Rome Statute. Insofar as Articles 43(6) and 68 of the Rome Statute provide for the protection of witnesses by the Court, there have been interpretational, applicability and implementation challenges. 191 That notwithstanding, effective witness protection at the ICC can be achieved only when the above provisions have been properly understood and applied.

It has been argued by William Reisman and others that in order to achieve a world of community that is good for humanity, the law should at all times serve human beings. 192 Those entrusted with interpretation and application of appropriate protective measures within

187Mahony, C. (2010) The Justice Sector after thought: Witness Protection in Africa, Pretoria, Institute of Security Studies, p.1.

188 Article 68(1) of the Rome Statute.

189 Chapter 1, see 1.2.

190 Eikel, M, *Op. Cit*, Criminal Law Forum, p.97.

191 Kayuni, S, *Op. Cit*, p.273.

192 Reisman, M., *et. al.* (2007) The New Haven School: A Brief Introduction. 32 Yale Journal of International Law, p.579.

the legal framework of the Rome Statute can competently fulfil their duties only if they focus on the aims of the ICC, namely justice and an end to impunity.[193] Although there are a number[194] of approaches to the interpretation and application of law, this chapter is an examination of the legal practices surrounding non-procedural witness protective measures through the lens of policy-oriented jurisprudence. It will be argued that policy oriented jurisprudence is a suitable approach for the interpretation, application and implementation of proper and efficient non- procedural witness protective measures within the Rome Statute.

This chapter provides, firstly, an overview of policy-oriented jurisprudence in relation to the present ICC witness protection practice. It secondly discusses criticism levelled against policy-oriented jurisprudence. These criticisms have mainly emanated from proponents of other approaches to international law that would possibly apply to the interpretation, application and implementation of the ICC's witness protective measures. These perspectives are as follows: theoretical positivism, critical legal studies ('CLS'), law and economics ('L & E') and feminism.[195] Therefore, such theories demonstrate shortfalls of policy oriented jurisprudence. Later in this chapter, there is an analysis of policy-oriented approach in the context of interpretation and application of witness protection measures within the Rome Statute. It further provides a rationale as to why a policy-oriented approach is the most suited method for decision-makers to interpret and apply protective measures for witnesses within the Rome Statute. Such an approach is reflected throughout the thesis..

2.2 POLICY ORIENTED JURISPRUDENCE

193 Bassiouni, M,C (2005) The Legislative History of the International Criminal Court, Ardsley, NY, Transnational Publishers, p.121.

194 For example, Positivism, feminism, law and economics, critical legal theory.

195 There are some other methodologies that have been left out of this critique such as Third World Approach to International Law and International Relations and International Legal Process. These have been left out essentially because when considered in line with Witness Protection at the ICC, they are not likely to be appropriate or applicable to the interpretation of protective measures.

Policy oriented jurisprudence196 or '(l)aw, science and policy'197 later associated with the New Haven School, in recognition of its geographical and intellectual locus,198 was first developed by Myers S. McDougal, a professor of law and Harold D. Lasswell, a professor of political and social science at Yale University over half a century ago.[199] It emerged from frustrations of an understanding of law as merely an autonomous body of rules.200 The two professors argued that such understanding viewed jurisprudential considerations of policy as an intrusion of 'politics' into the realm of 'law.'201 In justifying policy considerations during law training, the professors argued as follows: "….the main contours of our contemporary confusion have long been plainly visible. Heroic, but random efforts to integrate 'law' and 'the other social sciences' fail through lack of clarity about what is being integrated and how and for what purposes……if legal education in contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient and systematic training for policy-making, …… this is not proposed as something utterly new or exotic … no one who deals with the law, however defined can escape policy when policy is defined as the making, of important decisions which affect the distribution of values.…"(*original emphasis*).202 What the professors essentially meant is that for a long time there had been lack of consideration for law and policy. Training of lawyers in the contemporary world needed to include elements of policy-making. In terms of this research, it is suggested that there can never be an understanding of the ICC's legal framework for witness protection without regard to the Court's policy ideals. This School has grown into a worldwide

196 Wiessner, S (2009) Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman. 34 Yale Journal of International Law, p.526.

197 *Ibid*; these terms have been used interchangeably to designate this unique configurative problem and policy-oriented theory about law.

198 Cheng, T. (2011) Making International Law Without Agreeing What It Is, 10(1) Washington University Global Studies Law Review, p.12.

199 See generally Lasswell, H. & McDougal, M. (1943) Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale Law Journal, p.203.

200 Suzuki, E, (1974) The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence, 1 Yale Studies of World Public Order, p.1.

201 Lasswell, H. & McDougal, M. (1943) Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale Law Journal, pp.203, 243-244, 246-247.

202 *Ibid.*

epistemic community of adherents.203 Though this was the case, the approach failed to dominate Europe.204 Possibly, this was because of its fundamentally different approach to Hans Kelsen's normativist view that had been and continues to be enormously influential throughout continental Europe. 205 Compared to diverse 206 American theories of international law, European perspectives were substantially less distinct.207 However, there was reciprocal ignorance of the dominant approaches on both sides.208 It is suggested here that policy oriented jurisprudence hugely benefitted from the strategic spread and major contribution of McDougal's academically and professionally successful student-disciples from Yale School.209 Contegreil argued that despite its jurisprudential orientation, the major contribution of policy-oriented approach could not be ignored. 210 Harold Koh has acknowledged that the approach has contributed to "the defining tradition within most post-war international law scholars" (original emphasis).211 Further, Former ICJ President, Dame Rosalyn Higgins explicitly endorsed the approach as not just application of neutral rules but

203 Cheng, *Op. Cit*, p.12.

204 Contegreil, J, (2008) Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror, 60(1) Maine Law Review, pp.98-99.

205 *Ibid*, p.98; Neil Duxbury confirms this domination by his omission of any reference to Kelsen's approaches to law in his comprehensive survey. Kelsen's views had largely failed to find adherents in the US, *see generally*, Duxbury, N (1995) Patterns of American Jurisprudence, Oxford, Clarendon Press.

206 Ratner, S, & Slaughter, A, (1999) Appraising Methods of International Law: A Prospectus for Readers, 93 American Journal of International Law, p.291.

207 Jouannet, E, (2006) French and American Perspectives on International Law: Legal Cultures and International Law, 58 Meine Law Review, p.291.

208 Pildes, R,H, (2003) Conflicts Between American and European Views of Law: The Dark Side of Legalism, 44 Virginia Journal of International Law, p.145; *see also* Contegreil, J, *Op. Cit*, pp. 99-100.

209 Among them were Michael Reisman, the future Professor of Law at Yale Law School and Future President of the American Commission of Human Rights Organization of American States, Florentine Feliciano, the Future President of the Supreme Court of the Philippines and the Future Chairman of the Appellate Body of the World Trade Organization, the Dame Rosalyn Higgins, the Future President of the International Court of Justice, McDougal, M, Reisman, W.R (1981) International law in contemporary Perspective: the Public order of the World Community: Cases and Materials, Mineola, NY, Foundation Press.

210 Contegreil, *Op. Cit*, pp.100-101.

211 Contributed to international law theoretical approach after Second World War, *see* Koh, H, H (1997) Why Do Nations Obey International Law, 106 Yale Law Journal, p.2620.

an influential decision-making and prescribing process for resolving problems.212 It has tools that can assist anyone in any context who is grappling with and trying to solve a problem.213 It is an approach or methodology that views international law as a process of decision-making. Through its prism, various actors in the world community clarify and implement their common interests in accordance with their expectations of appropriate process and effectiveness in controlling behaviour.214 It is an adoption of the analytical methods of the social sciences to the prescriptive purposes of law.215 These prescriptive purposes demand a focus on the realities of authority and control while avoiding or eschewing naked power, 216 the exercise of legal authority, or power without a corresponding interest in the well-being of such an entity.217 It is a focus on more than rules and how decisions made by reference to those rules affect human beings.218 Briefly, policy oriented jurisprudence seeks to develop tools that can bring about changes in public order and make more closely approximate to the goals of human dignity. There is a possibility that policy-oriented jurisprudence can aid the ICC's witness protection system challenges. There can be development of themes that can help the Court overcome its current challenges, provide protection and justice to its vulnerable witnesses.

Analytical methods of social sciences such as modes of organising data about various social processes, modality of phase analysis, and analytical breakdown of the actual components of the decision are used to make various recommendations to a wide range of decision makers

212 *See generally*, Higgins, R, (1995) Problems and Process: International law and How we use it, Oxford, OUP.

213 Reisman, W, M, Wiessner, S, Willard, A, (2007) The New Haven School: A Brief Introduction, 32 Yale Journal of International Law, p.576.

214 Ratner, S. and Slaughter, A. (1999) Appraising the Methods of International Law: A Prospectus for Readers, 93 American Journal of International Law, p.294.

215 Reisman., *Op. Cit.*, p.576.

216 Wiessner., *Op. Cit.*, p.526.

217 For instance, a strict adherence to rules by decision-makers at the ICC without actual interest in the well-being, welfare and circumstances of witnesses.

218 McDougal, M (1961) Jurisprudence For a Free Society, 1 Georgia Law Review, p.2.

about appropriate action and responses.219 The approach provides a forecast to the possible extent and impact of alternative future decisions and their consequences. That forecast accords conceptual tools for those using it to invent and appraise alternative decisions, constitutive arrangements, and courses of action. 220 Among the most significant contributions of oriented jurisprudence and a guiding light221 is a belief in the future of a *minimum* and *optimum* world public order. According to the school, these are and must be the overarching goals of international law.222 Minimum public order in its essence refers to the global state of affairs with limited recourse to unauthorized violence to solve disputes while optimum public order is synonymous with a world in which human dignity is maximally protected. This approach advanced a comprehensive and revolutionary conception of international law and its goals with its influence still being felt many years after its inception.223 It was a reasoned rule scepticism that even McDougal's least fervent disciples would never renounce.224

According to its adherents, a jurist's function is that of responsible interpreter of policy commitments embodied in legal prescriptions and procedures. As a skilled specialist of the intimate workings of such prescriptions and procedures, he or she should not be limited to mere analysis of the logical interrelations among legal propositions.225 In order to appreciate the impact of a decision, decision-makers226 should extend their roles to inquire further into

219 *Ibid.*

220 Reisman, M., et. al. (2007) The New Haven Scholarship: A Brief Introduction, 32 Yale Journal of International Law, p. 576.

221 *Ibid.*

222 Ratner, S. (2010) Between Minimum and Optimum World Public Order: An Ethical Path \for the Future in Arsanjani, M.H & Cogan Jacob (Eds.) Looking To The Future: Essays on International Law in Honour of W. Michael Reisman , Martinus Nijhoff Publishers, Leiden p.195.

223 Cantengreil, J. (2008) Legal Formalism Meets Policy-Oriented Jurisprudence: A more European Approach to Frame the War on Terror, 60 (1) Maine Law Review, p.98.

224 *Ibid.*

225 McDougal, M, S, (1953) International Law, Power and Policy: A Contemporary Conception, 82 Recueil Des Cours, p.157.

226 Judges, Prosecutors, Defence lawyers, Registrar, ICC collaborators such as NGOs and national institutions of states parties.

and advise about possible decision effects upon community values.227 Scholars should have a responsibility of identifying and recommending prescriptions, organizations and decisions that would contribute towards an effective development of international law of human dignity. 228 In the foregoing, there is an explanation of what such identifications and prescriptive recommendations are and their effects on decision-making.

By describing international law as a comprehensive process of authoritative decision-making, 229 the approach opens up an appealing viewpoint insofar as the study of international law is concerned. It is a realistic perspective whereby the actions of decision makers are an important premise from which inferences may be drawn in terms of the content of international norms applicable in day-to-day situations. 230 From its viewpoint, an authoritative decision means that law and policy are interchangeable.231 Legal techniques should be applicable in every aspect of policy decision-making.232 Rules dissipate their effectiveness when they guide a decision-maker to relevant factors and presumptive weightings. 233 Therefore, the approach accords a lawyer an opportunity to competently contribute towards policy formulation, and identifying policy alternatives in the process. This is a more helpful approach than that of viewing international law as merely a collection of data that is part of the lawyer's equipment and subject to changes in content according to the most recent policy decisions of nation state or institutional officials.234 McDougal and others

227 *Ibid*; though sociologists, political and economic scientists may know better, jurists as decision-makers need to appreciate the impact their decision can have on a community. Such appreciation will help generate better decision-making.

228 *Ibid*, p.140.

229 McDougal, M. (1963) A Footnote, 57(2) American Journal of International Law, p.383.

230 D'Amato, A, (1984) Jurisprudence: A Descriptive and Normative Analysis of Law, Leiden, Martinus Nijhoff Publishers, p.189.

231 Falk, R. (1965) International Legal Order: Alwyn V Freeman vs Myres MacDougal, 59 American International Law Journal, p.66.

232 D'Amato, *Op. Cit*, p.189.

233 McDougal, M. *et. al* (1960) Studies in World Public Order, New Haven, Yale University Press, p.887.

234 D'Amato, *Op. Cit*, p.190.

confirm this as follows: "…the lawyer today is even, when not himself a maker of policy, the one indispensable by an adviser of every responsible policy-maker of society."235

When created, policy oriented adherents were frustrated with the circuitous and meandering approach adopted by realists at the time.236 Legal realism, though not a unified collection of thought,237 challenged the view of the law as an autonomous system of rules and principles that Courts or judges could apply logically and in an objective manner in order to unbiasedly determine a case or judicial decision.238 The law is not static but dynamic, continuously changing as society changes.239 There is no legal certainty.240 In agreement with Fuller, Fiss argues that "There can never be a right answer in morals just as certainly as there can never be a right answer in law."241 Law is a form of politics242 of which "lawyers like pilots must be always distrustful of themselves, on guard against the risk of mistaking their political or social preferences for those of the law."243 Therefore, the law greatest danger of legal realism is not its definition of 'law' but its 'positivistic spirit,' namely denial of the force which ideas have without reference to their human sponsorship.244 This toolkit for understanding and shaping of the law 245 is not only applicable to domestic law but

235 McDougal, *et. al*, Studies in World Public Order, *Op. Cit*, p.49.

236 McDougal, M, S, (1959) Perspective for an International Law of Human Dignity, 53 American Society of International Law Proceedings, pp.107-112.

237 Singer, J, W, (1988) Review: Legal Realism Now, 76(2) California Law Review, pp. 465-544.

238 Gilmore, G, (1961) Legal Realism: Its Cause and Cure, 70(7) Yale Law Journal, pp.1037-1048.

239 *Ibid*,p.1038.

240 Fuller, L.L, (1936) American Legal Realism, 76(6) Proceedings of the American Philosophical Society, p.194.

241 Fiss, O, (1986) The Death of the Law, 72 Cornell Law Review, pp.12-13.

242 Singer, *Op. Cit*, p. 465.

243 Carrington, P, (1984) Of Law and the River, 34 Journal of Legal Education, p.226.

244 McDougal, M, (1940-1941) Fuller vs. The American Legal Realists: An Intervention, 50 Yale Law Journal, p.830.

245 Wiessner, S, (2010) The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law, 81(1) Asia Pacific Law Review, p.45.

international law as well. 246 Human being is the ultimate tool of observation and appraisal. 247 It is suggested that decision-making authority in both domestic and international settings must constantly check their focus and test their conclusions in order to avoid errors. This will enable and empower the decision-makers, particularly those engaged in law or politics, to more efficiently identify common interests and ways to implement them society's problems. 248 Early adherents of policy oriented jurisprudence considered the realists' approach to international law as leaving certain matters unresolved. Such realist explanations regarding the context in which decisions are made, semantic limitations and what actually complements the nature of legal rules, were not properly addressed. 249 Contrary to the positivists' views that legal decisions are made by courts,250 policy oriented jurisprudence argues that decision-making is a dynamic process.251 Decision-making needs to be looked at from many different institutional positions and contexts.252 The rule is only one element in the analysis of a decision.253 While agreeing with realists,254 the approach

246 Despite Policy oriented jurisprudence being mainly applicable to international law, its adherents have argued that it is equally relevant to the domestic arena as well. However, it has to be observed that such an approach has thrived more in international law than domestic law. McDougal had spent two decades of revolutionary work in the field of property law. He then turned his attention to the international arena where with various collaborators including Professor Lasswell wrote seminal treaties on distinct areas of international concern at the time when world war two was ending and cold war was in session. It is a perspective that considers law as a dynamic integrated process of decision-making that operates at many different community levels and through many different institutional devices. Such existence enables resolving of conflicts, effect on policies and values of that community including its national decision-makers. The values it advocates for are applicable to all humanity regardless of an international or national situation, McDougal, M,S, (1959) The Impact of International Law upon National Law: A Policy-Oriented Perspective, 4 South Dakota Law Review, p.25.

247 Cheng, T, (2013-2014) Preface: Policy-Oriented Jurisprudence and Contemporary American Legal Education, 58(4) New York Law School Law Review, p.771.

248 Content and technique to analysis and resolution of society's problems, Wiessner, S, (1998-1999) Professor Myres Smith McDougal: A Tender Farewell, 11 St. Thomas Law Review, pp.205-206.

249 McDougal, M, S, Perspective for an International Law of Human Dignity, *Op. Cit*, pp.107-112.

250 *See generally* D'Amato, A. (1965) The Neo-Positivist Concept of International Law, 59 American Journal of International Law, p. 321; see also generally Hart, H. (1961) The Concept of Law, Oxford, Clarendon Press.

251 Silverstein, A.J. (1974) Emigration: A Policy-Oriented Inquiry, 2 Syracuse Journal of International and Commerce, pp.150- 151.

252 D' Amato, *Op. Cit*, Jurisprudence: A Descriptive and Normative Analysis of Law, pp.182-183.

253 Myres S. McDougal, (1940) Fuller vs. The American Legal Realists, 50 Yale Law Journal, p.827.
254 Harold D. Lasswell & Myres S. McDougal, (1943) Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale Law Journal, p.237.

argues that judges are accustomed to making and refocusing attention from rules to decisions. These decisions are anchored on diverse social and personal experience.255 In clear terms, law is a secular craft or artifact created by human beings to achieve certain goals that a legal system wishes to attain.256 As such, a social engineering function or the influence of the persons dealing with the law cannot be underestimated. 257 Law should be used as an instrument for policy making258 in clarifying jurisprudence and securing common interests in a community.259

According to advocates of policy-oriented jurisprudence, there are *eight* goals that human beings cherish as values towards public order of human dignity.260 Such human dignity goals are logistically exhaustive but empirically open261 to include minimum standards262 for recognition and respect for human rights by all peoples.263 A choice among the eight goals or values should guide the decision-making process. Such listed goals enable a decision maker roughly to approximate categories by which data is obtained and processed.264 These values are firstly, *Power*.265 There should be generous support given to an institution or

255 *See generally* Jerome, F. (2009) Law and the Modern Mind (With New Introduction by Brian H. Bix) Transaction Publishers, New Brunswick, pp.108–126.

256 Reisman, M. (1985) McDougal's Jurisprudence: Utility, Influence, Controversy, 79 American Society of International Law Proceedings, p.279.
257 *Ibid.*

258 McDougal, M. (1992) Jurisprudence for a Free Society: Studies in Law Science and Policy, New Haven, New Haven Press, p.xxii.

259 *Ibid*, p. xxi.

260 See generally McDougal, M., Reisman, WM., & Willard, A.R (1988) The World Community: A Planetary Social Process, 21 University of California Davis Law Review, p.807.
261 Wiessner, S, (2010) 81(1) Asia Pacific Law Review, *Op. Cit*, p.45.

262 Schachter, O, (1983) Human Dignity as a Normative Concept, 77(4) American Journal of International Law, pp.848-854.

263 Winston, D, Nagan, P. (1992) African Human Rights Process: A Contextual Policy-Oriented Approach, 21 Southwestern University Law Review, pp.63-104.

264 Harold D. Lasswell, On Political Sociology in Marvick, D (Eds.) The Heritage of Sociology, Chicago, University of Chicago Press, pp.116-117.

265 Adherents to the approach would ask questions as follows: (i) To what extent is power widely or narrowly held by the decision makers? (ii) How many members of the community being investigated or observed are involved either directly or indirectly in enacting prescriptions, recommendations or invocations for that

office that is making a decision. Further, such an institution or office should be in a position to receive the said support without any encumbrances. For instance, states parties to a treaty that establishes a court such as the ICC should accord enough support to the ICC and the ICC should have legal framework to receive the said support.266 Governments of both states parties and non-states parties including regional bodies should provide enough support to the Court. Further, the decisions made by the court should be easily enforced by the world community.267 For instance, decisions taken by the ICC, on balancing peace and justice,268 should be respected by the world community. Coordination among organs of the Court is another source of power and support for the Court. If there is no intra-coordination among its organs, the Court cannot operate effectively. In furthering this, goal questions of concern might arise relating to effectiveness of participation in making important decisions, 269 whether those that the decisions target are involved in decision-making process. It is suggested that for there to be proper and effective changes, there is always need for some procedures to be laid down for clarifying goals or values that are desirable in that community. Contexts need to be examined, strategies need to be designed, resources need to be mobilised, and results need to be appraised as well.270 Therefore, where there is full support from states parties, international and regional bodies, non-state actors and individuals for the effective functioning and specialized decision-making, such an international organization or body can easily work towards the attainment of power as a cherished value that world community wants.

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community? (iii) To what extent are the processes of adjustment coercive or persuasive? (iv) How intense is the expectation of violence? (v) How intense is the expectation of peaceful agreement? These are some of the vexing questions that considerations of policy oriented jurisprudence can have in terms of power as a cherished goal.

266 Cryer, R.(2006) International Criminal Law –v- State Sovereignty: Another Round? 16(5) European Journal of International Law, pp. 982-983.

267 Flint.,J. & De Waal, A. (2009) Case Closed: A Prosecutor Without Borders, 171 World Affairs, p.23.

268 Apuuli, KP (2006) The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', 4 Journal of International Criminal Law, p.179.

269 McDougal, M.S (1969) The World Constitutive Process of Authoritative Decision in Falk, R. & Black, C. (Eds.) The Future of the International Legal Order: Trends and Patterns, Princeton, NJ, Princeton University Press for the Centre of University Studies, p.73.

270 Reisman, M. (2008) Development and Nation-Building: A Framework for Policy-Oriented Inquiry, 60(2) Maine Law Review, p.313.

The second goal is *Wealth.*271 Economic growth and trade in terms of production and distribution of goods and services, and consumption is also a cherished goal of a community in order to achieve human dignity.272 When considering this value, decision maker should explore how possible it is in a community to have control over economic assets. Further, how comfortable is the economic welfare? 273 McDougal argues that wealth of a community can only be tested as to its rightfulness in terms of the production, distribution and consumption of its products.274 Therefore, the collective resource base275 will play a serious or central role towards measuring the wealth that the international community cherishes. How much cooperative states parties and third party states are to an organization such as the ICC in terms of contributions towards effective funding of witness protection and relocation programs can be a measure of wealth cherished by the world community.276 Decision-making that can help the ICC overcome shoestring and inflexible budgets towards witness protection would be a concrete measure of the wealth value that adherents of policy-oriented jurisprudence promote.

The third goal is *Enlightenment.*277 Enthusiasts to law, policy and science jurisprudence will argue that there should be accessibility to the knowledge on which rational choice

271 Policy oriented approach advocates would question in the following manner when it comes to the issue about wealth: (i) To what extent is the economy focused on savings and investments? (ii) What fiscal measures make for forced saving or discourage saving and investment? (iii) Are there minimum income guarantees available?

272 Hoof, G. (1983) Rethinking Sources of International Law, Deventer, Kluwer Academic Publishers, p.42.

273McDougal, M. & Lasswell, H.D (1966- 1967) Jurisprudence in Policy Oriented Perspective, 19 University of Florida Law Review, p.506.

274 *Ibid.*

275 *See generally,* S. Arbia, (2010) The International Criminal Court: Witness and Victim Protection and

Support, Legal Aid and Family Visits' 36 Commonwealth Law Bulletin, p.519.

276 Eikel, M., *Op. Cit,* Criminal Law Forum, p.98.

277 Followers of policy oriented jurisprudence would be seriously asking the following question: (i) To what extent does the community protect the gathering, transmission and dissemination of information? (ii) how about guarantees for freedom of press, freedom of research, freedom of research reporting?

depends.278 It has to be investigated as to how accessible is the knowledge on which sensible choices can be made or be dependent upon. All the necessary information should be laid before the decision maker in order to make a rational decision. When designing and implementing desired change, there should be general knowledge or information that is practically available to such a decision maker. For instance, where it is an international body that has agencies in other parts of the world apart from its headquarters, when it comes to making a rational decision, it is the duty of the participants and actors working in those agencies to put before the organization or decision maker concrete information that will help in deciding a crucial issue. The ICC has intermediaries,279 investigators, NGOs, and national bodies that help with the collection and report on crucial issues dealing with witnesses. It is the duty, law and policy of the participants and actors to enhance protective measures if the evidence proves a precarious situation for the witness.280 In other instances, there may be a need for a purposive relocation of such a witness based on an assessed danger to him or her. 281 Only concrete and persuasive information about the witness welfare and circumstances would be relevant for the OTP, VWU and the Defence to persuade judges as decision-makers to order appropriate procedural and non-procedural protective measures. Therefore, it is argued that the fact that there is enough information is a concrete measure that enables the judges as decision- makers to come up with appropriate protective measures.

*Skill*282 is the fourth value. The approach gives the opportunity to the community to acquire and exercise capability in vocation, professions and other social activities.283 There is need

278 Cantegreil, J. *Op. Cit*, p.105.

279 The terms does not appear in the Rome Statute of the ICC but first appeared in the ICC Draft Guidelines for Intermediaries, 2010; De Vos, Christian, (2011) Someone who comes between one person and another: Lubanga, Local Cooperation and the Right to Fair Trial, 12 Melbourne Journal of International Law, pp.17-18.

280 Article 68(1) of the Rome Statute.

281 *Prosecutor –v- Katanga and Ngudjolo*, Judgment on the Appeal of the Prosecutor Against the ‘‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 67 of the Rules’’ of Pre-Trial Chamber I, Dissenting Opinion of Judge Georghis M. Pikis and Judge Daniel David Ntanda Nsereko), ICC-01/04-01/07-776 (26 November 2008), para. 15.

282 A decision maker following policy oriented jurisprudence will definitely ask the following: (i) To what degree is the body politics committed to optimum opportunity for the discovery and cultivation of socially acceptable skills on the part of everyone? (ii) Is there universal and equal access to educational facilities? Are new skills recognised and assisted readily?

for able and proficient exercise of talents in order to make the right and diverse choices.[284] New skills need to be readily available and acquired in order to facilitate or contribute new knowledge to an institution for instance. Decision makers need to have requisite skills to properly interpret and accord the right purpose of the law and policy. If it is an organization that is dealing with protecting people physically, people with training in that area need to be readily available. If it is an institution dealing with prosecution or investigations, then prosecutorial or investigative skills need to be available. The same applies to an institution dealing wholly or partly with psychological and social welfare of people. That as well will need the requisite skills of psychology training or social training. It has to be inquired into whether ICC officers as decision-makers have the requisite skills to properly provide rule interpretation and accord protective measures to witnesses in need of the same due to account of their testimony or contact with the Court. Is there an increased pool of specialized skills that require physical and the much needed psychological[285] expertise for the realization of dignity and protection of the witnesses? Attempts by the Assembly of States Parties (ASP) and the ICC to find a place for the intermediaries is another good measure demonstrating an increased capacity to forge and disseminate new skills in areas of psychology[286] and gender sensitive witness protection.[287] What are the levels of professional training among the decision-makers for them to appreciate implications of protective measures being put forward?[288]

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283 Suzuki, E. (1974) The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence, 1 Yale Studies of World Public Order, p.22.

284 Reisman, M. (1996) A Jurisprudence From the Perspective of a Political Superior, 23(3) Northern Kentucky Law Review, p.610.

285 Sandick, P., *Op. Cit*, p.112.

286 ICC (2014) Guidelines Governing the Relations between the Court and Intermediaries: For the Organs and Units of the Court and Counsel working with Intermediaries, pp.13-14, https://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf; see also OSJI (2011) Commentary on the ICC Draft Guidelines on Intermediaries, http://www.refugee-rights.org/Assets/PDFs/2011/icc-intermediaries-commentary-20110818.pdf , last accessed on 7 November 2013.

287 *See generally*, Chapell, L., Grey , R., & Waller, E. (2013) The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia, 7(3) International Journal of Transitional Justice, pp.455-475.

288 Suzuki, E. (2012) The New Haven School of Jurisprudence and Non- State Actors in International Law in Policy Perspective, 42 Journal of Policy Studies, p.46.

The fifth goal or value is *Well-being*.289 This is the enjoyment of physical, social and psychological health by the community.290 It is only a sane and healthy community that can achieve its stated goals or objectives. A sick community cannot achieve anything. Therefore, actors and participants in a world community need to be healthy and psychologically well to attain human good. Human good can only be enjoyed when one is in good health. An institution needs to make sure that its participants or actors are in good health. An example is the witness protection legal framework at the ICC, one of the goals of the world community is the physical and psychological welfare of the witnesses that testify before the court.291 This is the only way their testimony can be secured. The same goes for intermediaries as well. The question should always be whether there is enough psychological help for those that may be victims,292 or vulnerable in the community targeted? Therefore, the fact that the ICC has in place processes enhancing well-being including decreased expectation of incidences of anxiety293 can be argued to be the right direction towards attainment of desired goals of the world community.

The sixth value is *Affection*.294 Proponents of the theory have referred to this as positive sentiments towards others and loyalty to groups.295 Thus there is need for the presence of

289 Fifth goal is *well-being*. Proponents of law, policy and science would ask: (i) To what extent is continued increase of numbers encouraged even at the expense of immediate improvement of the values available to individuals? (ii) To what extent is the population sought to be protected from mental and physical deprivation? (iii)To what extent is the degree of health, comfort, safety of population?

290 Suzuki, E., *Op. Cit*, Yale Studies of World Public Order, p.22.

291 Article 68(1) of the Rome Statute of the International Criminal Court; Pena, M., & Carayon, G. (2013) Is the ICC Making the Most of Victim Participation? 7(3) International Journal of Transitional Justice, p.520.

292 Blattmann, R. & Bowman, K. (2008) Achievements and Problems of the International Criminal Court: A View From Within, 6 Journal of International Criminal Justice, p.714.

293 Reisman, *Op. Cit*, Maine Law Review, p.313.

294 This affection goal has vexed minds of those following the policy-oriented theory with questions such as: (i) what is the protection given to the family and other institutions of congeniality?

295 Reisman, *Op. Cit*, Maine Law Review, p.133.

amiable human relationships among the community members.296 Existence of withering or shrinking ties of identifications leading to exclusive attitudes and hostility within a community negatively affect this value. A decision maker should be able to inquire on whether there is any affection or how affection can be strengthened in a community. This is for both the participants and actors. A decision maker should further inquire on possibilities of strengthening the health of community groups or organizations in the end. An example is the relationship between the ICC and its partner organizations both national and international and, at times, even regional. Another example is the policy of the Registrar of the ICC within its mandate and legal framework to provide protection to witnesses and victims with due regard to their family obligations as a way of enhancing inclusive protective measures within that community.297 Further, according to the ICC, it can be argued that exclusiveness of the witness protection measures towards polygamous families work negatively towards achieving the goals of world public order relating to affection.298

The seventh value is *Respect.*299 Proponents of policy-oriented jurisprudence argue that granting or withholding recognition is central to decision-making process. 300 Such recognition can be personal or ascriptive.301 The basic question becomes whether one is in or out. The truly important matter is whether or not an individual or group or nation state is recognized as a self-directed participant in the pertinent decision-making process.302 For

296 Suzuki, *Op. Cit*, Yale Studies of World Public Order , p.22.

297 Arbia, S. (2010) The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits, 36 (3) Commonwealth Law Bulletin, pp.520-522.

298 ICC, Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf , last accessed on 7 November 2013.

299 Seventh cherished goal of *respect* attracts questions such as: (i) what is the commitment to caste or to mobile class forms of society? (ii) To what extent is minimum respect accorded to everyone on the basis of mere membership in the human race?

300 Batt, D. & Short, D. (1992-1993) The Jurisprudence of 1992 Rio Declaration on Environment and Development: A Law, Science and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development, 8 Journal of Natural Resources and Environmental Law, p.276.

301 Suzuki, E., *Op. Cit*, Journal of Policy Studies, p.46.

302 Batt & Short, *Op. Cit*, p.276.

instance recognising that all persons or group of persons or nation states are equal participants in the decision making process with no one having an edge over the other is crucial or prime to the decision being considered. A community needs to consider other values such as social class303 obtaining in that community. Members of a community need to look at themselves as full participants with full rights access to claims in their own right and minimal presence of discriminatory tendencies.304 Attaining this would work towards achieving respect as a value for human good. A world arena characterized by persisting expectations of violence towards those with dissenting views or non-conformists is outlawed.305 To a policy-oriented adherent, there is a deepening community concern for outlawing intolerance to non-conformists. An example is the decision maker at the ICC where the organs of the court need to consider the ties they have towards each other306 on the one hand and external ties on the other.307 These ties can meaningfully contribute towards achieving attainment of dignity for witnesses. Hierarchical status of either the OTP or the VWU or the PTC and TC would negatively affect efforts to achieve the goals of human dignity. This is so because the very fact of having hierarchical status grants recognition to some organs of the ICC while withholding recognition to others. Some are in and some are out. A decision emanating from such a hierarchy would give more weight to considerations of one organ while giving less weight to considerations of another organ yet all such organs are working towards the same goal of human dignity. In the end, it is the interpretation and applicability of the protective measures of witness protection that are going to face serious challenges.

303 Suzuki, E., *Op. Cit*, Yale Studies of World Public Order, p.23.

304 Reisman, *Op. Cit*, Maine Law Review, p.313.

305 McDougal, M, & Lasswell, H. (1975-1976) Non-Conforming Political Opinion and Human Rights: Transnational Protection Against Discrimination, 2 Yale studies in World Public Order, p.1.

306 OTP, VWU and Chambers (TC & PTC).

307 States Parties, Third Party States, Non-Governmental Organizations, Regional Organizations and International Organizations.

The eighth and last goal is R*ectitude.*308 Proponents of the approach have argued that there should be integrity in sharing common standards of conduct.309 Members of the community need to be tolerant towards other responsible conduct within the community. For example, in order for the ICC's witness protective measures to attain this value, there is need for integrity of decision makers whereby all participants work towards tolerance in the application of norms of responsible conduct.310 The decision maker needs to understand that there is need for a certain standard of decency, integrity, demeanour and credibility. In order to achieve this, Reisman argues that consideration should go to individual and collective life that will achieve rectitude. 311 Rectitude refers to the freedom of conscious, thought, religion, presumption of innocence and freedom from retrospective application of laws or *ex post facto*.312 Therefore, decision makers, as those responsible for application of standard of responsible conduct, need to bear in mind and respect such values like culture emanating from the community that is to be affected by the decision. For instance, at the ICC level, cooperation with such actors like states parties, third party states, witnesses, international organizations and regional organizations can only be successful if rectitude is adhered to. For example, various countries have differing legal, cultural and religious aspects. When it comes to witness protection measures, these have to be respected otherwise there is risk of having no cooperation at all.

With respect to these goals, it is suggested that in order for one to align himself or herself with these values of human dignity or fundamental goals, human dignity should be promoted deliberately in order to leave everyone free to justify it in terms of his or her preferred

308 The believers in law, policy and science would like the decision maker to ask himself or herself the following questions pertaining to rectitude: (i) To what degree does the body politic protect freedom of worship and religious propaganda? (ii) What are the degrees of decency, integrity, uprightness, demeanour and credibility in that community?

309 McDougal, M. & Lasswell, H. (1966-67) Jurisprudence in Policy oriented Perspective, 19 University of Florida Law Review, p.506.

310 Reisman, M., *Op. Cit*, Maine Law Review , p.313.

311 Reisman, W, (1996-1997) International Law and The Inner Worlds of Others, 9 St. Thomas Law Review, p.25.

312 Trimble, P. (1990) International Law, World Order and Critical Legal Studies, 42 Stanford Law Review, p.814.

theological or philosophical traditions.313 Each decision-maker should prioritise one of these values. There is no order of importance in their ranking. Suzuki has argued that the position of the value varies due to subjectiveness, time and culture.314 Though some scholars such as Philip Trimble has appraised the concept of human good as distinctly oriented in western values,315 these values bear a universal meaning, basic, instrumental and interdependent in a multicultural world.316 Further, delving deeper into how best witness protection decisions may be reached, the jurisprudence offers avenues that will enable decision-making that has a greater impact on the community goals.317

2.2.1 THE MAPPING PROCESS

Policy oriented jurisprudence regards those endowed with the decision-making process as the *participants*; the subjective dimensions that animate them are their *perspectives*, the resources upon which they draw their power as the *bases of power* and the ways they manipulate those resources as *strategies.* 318 Further, the approach advocates for a superstructure mechanism 319 where the decision-maker takes an *observational standpoint.320* Such a decision-maker is assumed to be at a position where he or she is looking at the process to be influenced. In order to achieve such an influence, he or she has to concentrate on techniques that will help make a decision. Such techniques are the considerations of values cherished by the community on which the decision will impact. When analysis and applicability of facts to

313 McDougal., M., *Op. Cit,* p.122.

314 Suzuki, E. *Op. Cit*, Journal of Policy Studies, p.46.

315 Weston, B.H, (2006) The Universality of Human Rights in a Multicultured World in Claude, R.P, & Weston, H.B (Eds.) Human Rights in the World Community: Issues and Action, Philadelphia, University of Pennsylvania Press, pp. 39-52.

316 Trimble, P, R (1990) International Law, World Order, and Critical Legal Studies, 42(3) Stanford Law Review, pp. 814-815; *see generally*, Donnelly, J, (2013) Universal human rights in theory and practice, New York, Cornell University Press.

317 Kayuni, S, *Op. Cit,* UCL Journal of Law and Jurisprudence, p.282.

318 Reisman, *Op. Cit,* University of Florida Law Review, p.578.

319 Reisman, M. & Schreiber, M. (1987) Jurisprudence: Understanding and Shaping Law, New Haven Press, New Haven, pp.516-517.

320 Reisman, *Op. Cit,* p.12.

the situation before him is done, such a decision-maker is said to have reached his or her *appropriate perspective*321 or position. From this position, he or she is able to apply the intellectual tasks of the decision by *goal clarification*, *past trends analysis*, *factor analysis*, *predictions* and *considerations of policy alternatives.*322 Consideration and choice of the policy intended is the meaning of goal clarification.323 Past trends require consideration of precedents or history324 and how similar decisions have been made in the past. Factor analysis can be explained as scientific breakdown of the decision. 325 Predictions are a forecasts of intellectual enterprise.326 Considerations of policy alternatives refer to possible courses of action in future.327

The superstructure described above has a *functional analysis* method or *mapping process* that each decision maker follows in order for the decision to be authoritative and controlling. This method helps maximize human dignity. 328 Analytically, such an authoritative and controlling decision is said to comprise seven functions. Firstly, there is*intelligence*. This relates to obtaining, processing and dissemination of information including planning for a decision. 329 This is the information that the decision maker comes across during

321 Doren, J & Roederer, C., *Op. Cit*, p.129.

323 Lasswell, H. (1971) The Emerging Conception of Policy Sciences, 1(1) Policy Sciences, p.11.

324 *Ibid.*

325 McDougal, M, Lasswell, H & Reisman, M (1967-1968) Theories About International Law: Prologue to a Configurative Jurisprudence, 8 (2) Virginia Journal of International Law, p.197.

326 Tipson, F.S (1973-74) Lasswell –McDougal Enterprise: Towards a World Public Order of Human Dignity, 14 Virginia Journal of International Law, p.535.

327 Higgins, R. (1968) Policy Considerations and the International Judicial Process, 17(1) International and Comparative Law Quarterly, pp.58-84.

328 Cheng, Tai Heng (2011), Positivism, New Haven Jurisprudence and the Fragmentation of International Law, in Weiler, T. & Baetens, F. (Eds.) New Directions in International Economic Law: In Memoriam of Thomas Walde, Leiden, Martinus Nijhoff Publishers, p.414.

329 McDougal, M., Lasswell, H., Reisman, M. (1967-1968) Theories about International Law: Prologue to a Configurative Jurisprudence, 8(2) Virginia Journal of International Law, p.19*2*

consideration of an issue before him or her. 330 Secondly, there is *promotion or recommendation*. This is the advocacy of general policy. 331 Initiatives should be taken towards attaining the enactment of prescriptions and mobilizing opinion towards a particular policy. 332 Thirdly, there is *prescription*. This is the crystallization of general policy in continuing authoritative community expectations. 333 Considerations for how general rules are prescribed is of great importance because a selection of a particular policy as community law and design for its implementation334 indicates the broader community expectations. It is a function that is rather difficult to grasp. 335 Fourthly, there is *invocation*. This is the provisional characterization of concrete circumstances in reference to prescriptions. 336 It addresses how rules are provisionally applied in reference to conduct as not being in line with community aspirations. An action by an institution can follow such invocation after exploring the facts put before it, relevant policies and a quest for an appropriate remedy. Fifthly, there is *application*. This has been described by proponents of policy-oriented jurisprudence as the final characterization of concrete circumstances according to prescriptions. 337 The way the general rules are applied matters. The exploration of the facts, analysis of available rules and policies leading to an interpretational decision that works towards clarifying goals for the community becomes the conventional conception of the law. Sixthly, there is *termination*. This is the ending of a prescription and disposition of legitimate expectations created when prescriptions were in effect. 338 The termination function demonstrates that a prior prescription, policy or rule is no longer commanding and that there is need to either change it,

330 Goldstein, J. (1975) For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain, 84 Yale Law Journal, pp.682-683.

331 McDougal, et. al, *Op. Cit*, p.192.

332 Chen, L. (1989) An Introduction to Contemporary International Law: A Policy – Oriented Perspective, New Haven, Yale University Press, p.333.

333 McDougal, et. al, *Op. Cit*, p.192.

334 Reisman, M (1996) A Jurisprudence from the Perspective of the 'Political Superior', 23 Northern Kentucky Law Review, p.605.

335 Chen, *Op. Cit*, p.341.

336 McDougal, et. al, *Op. Cit*, p.192.

337 McDougal, et. al, *Op. Cit*, p.192.

338 McDougal, *et. al*, *Op. Cit*, p.192.

amend it or get it replaced by something that more approximates the values of humanity. Policies or rules or prescriptions need a continuous review or assessment in order to conform to new practices or procedures on the one part and address challenges that a former prescription was wanting in many aspects. Seventhly there is *appraisal.*339 This is the evaluation of the manner and measure in which public policies have been put into effect and responsibility thereof.340 This function calls for an evaluation of overall performance of all decisions in terms of community requirements. Achievements and failures of a decision need to be evaluated in order to find out how a decision is functioning and how well it can be improved. Accordingly, these functions bring about a realistic analysis of relevant decision process.

From the above premise, it is argued that a policy oriented approach uses law as a means to an end.341 It is an instrument useful to society's progression towards certain predetermined goals for achieving universal order of human dignity.342 Despite the 'missionizing'343 terminology the approach attracted, and the complex terminology344 it incorporates, policy oriented theory is strikingly revolutionary and functional. It is orientated towards attaining the function of law in community345 namely achievement of human dignity. This has been successfully demonstrated in the various subjects of international law where it has been successfully employed. Examples of such success include disciplines such as Trade and Investment,346 Environmental law,347 Development,348 Human Rights,349 Emigration350

339 See generally, Lasswell, H. (1956) The Decision Process*:* Seven Categories of Functional Analysis, College Park, University of Maryland.

340 McDougal, M. *et. al*, *Op. Cit*, p.192.

341 Hoof, G., *Op. Cit*, p.41.

342 McDougal et. al, *Op Cit*, p.16.

343 Hoof, *Op. Cit*, p.41.

344 Bowett, D.,W. (1962) Book Review: McDougal, M. & Feliciano, P. Law and Minimum World Public Order: The Legal Regulation of International Coercion, 38 British Year Book of International Law, p.517.

345 Dillard, H.C. (1964) The Policy Oriented Approach to Law, 40 Virginia Quarterly Review, p.620.

346 Wanqiang, L. (2011) Chinese Foreign Investment Laws: A Review from the Perspective of Policy Oriented Jurisprudence, 19(1) Asia Pacific Law Review, p.37.

and arbitration.[351] Thus, policy oriented approach is still influential, live and well.[352] . Those who make legal decisions cannot escape policy choices.[353] They have to confront information gathering procedural processes before a legal decision is made.[354]

2.3 CRITIQUES OF POLICY ORIENTED JURISPRUDENCE – A 'PROPAGATION OF ANARCHY'

Opponents of policy oriented jurisprudence have argued about the irrelevance and weaknesses of the theory. In terms of this study, the proceeding approaches or theories can ably help provide answers to the witness protection research questions. As such, the theories below attempt to demostrate that policy oriented jurisprudence is at all a perfect theory. It is a theory with shortfalls.

2.3.1 THEORETICAL POSITIVISM

Numerous criticisms have been levelled against policy oriented jurisprudence. Positivists have argued that law is a concept with some special qualities and its own integrity.[355] According to Boyle, a true international lawyer must perform seven tasks in order to promote the science of international law. These tasks are: (a) exposition of existing rules of law, (b)

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347 Bratspies, R. M (2007) Rethinking Decision-making in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development, 32 Yale Journal of International Law, p.388.

348 Querim, Q. *Op. Cit*, pp.7-9.

349 Wiessner, S & Willard, A.R (1999) Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity, 93(2) American Journal of International Law, pp. 316 -334.

350 Silverstein, AJ., *Op. Cit*., p.2.

351 Cheng, T. (2006) Precedent and Control in Investment Treaty Arbitration, 30(4) Fordham International Law Journal, pp.1014-1049.

352 Doren, J. & Roederer, C (2011-2012) McDougal – Lasswell Policy Science Death and Transfiguration, 11 Richmond Journal of Global Law and Business, pp.125-126.

353 *Ibid*, p.126.

354 Reisman, M. & Schreiber, M. (1987) Jurisprudence: Understanding and Shaping Law, New Haven, New Haven Press, pp.516-517.

355 Brownlie, I (1998) The Rule of Law in International Affairs: The International Law at the Fifth Anniversary of the United Nations, Hague, Martinus Nijhoff Publishers, p. 3.

historical research, (c) criticism of existing law, (d) preparation of codifications, (e) maintenance of the distinction between old customary law and new conventional law, (f) fostering international arbitration, (g) popularization of public international law since public opinion can influence governments in its favour.356 It has been argued that the broad formulations which the proponents of policy-oriented jurisprudence rely on are thought provoking but tend to confuse normative prescriptions with factual assumptions.357 Insofar as it is important to evaluate rules and decisions in terms of policy, this process can be carried out in the absence of a special theory. Notwithstanding a portrayal of a balance between policy orientation and legal criteria, its proponents fail to acknowledge the approach's flexibility and how it operates.358 This can be very critical in a politically contentious international law arena such as witness protection. What comes out clearly is only an explanation that the approach is at odds with positivism. Policy oriented jurisprudence gives an impression that the legality of a given action depends on the identity of the actors. It leaves unanswered questions as to the origins of the decision makers. Its adherents concentrate on the political aspects of international law and heavy reliance on rules in form of treaties or agreements at the expense of the approach's context and technique of the mapping process, i.e. content and technique to analysis and resolution of society's problems. The mapping inquiry it advocates for is too wide as it includes everything one can imagine on the one hand and too rigid or not flexible enough as its presentation is like a menu where one has pick his or her choice.359 This menu-like presentation, makes it very difficult to apply or use to every problem faced by a decision maker. The fact that it attempts to explain every single aspect of a phenomenon and not make distinctions between essential secondary issues and tertiary aspects, undermines the approach. 360

356 Boyle, F.A (1985) World Politics and International Law, Durham, Duke University Press, p.19.

357 *Ibid*, p.9.

358 Mullerson, R, A. (2000) Ordering Anarchy: International Law in International Society, The Hague, Martinus Nijhoff Publishers, p.33.

359 Mullerson, *Op. Cit*, pp.35-36.

360 Little, D. (1973-74) Towards Clarifying the Grounds of Value-Clarification: A Reaction to the Policy – oriented Jurisprudence of Lasswell and McDougal, 14(3) Virginia Journal of International Law, pp. 451-452.

Essentially what policy oriented jurisprudence does is to attempt to order anarchy in an international society.361 There is a denial of the importance of rule-oriented approach and an overemphasis on other features and characteristics such as role of rules or past decisions towards controlling outcomes of decision-making processes.362 If such a policy oriented approach is tolerated, the end result is a differing interpretation of the very values that international law was called to protect. This is so because the role of rules and past decisions will always be different in a given community. For instance, there would be different standards of rule application between the East and West on issues such as democracy and human rights.363 The human good considerations will not be the same364 for all witnesses seeking privileges from the protective measures of the Rome Statute. The same applies to differing states parties to the Rome Statute entering cooperation agreements with the court for witness hosting and relocation. Further, the meaning of the justice concept in relation to the goals of the ICC between the west and most African365 states or the Middle East366 in terms of investigations and prosecutions of serious crimes is not always compatible. In a nutshell, policy oriented jurisprudence is a political theory of international law that denies contributions from other approaches, 367 too inclusive and not better than normative approaches that isolate politics from law.368 It is so dysifunctional and does not further international law goals.369

361 Mullerson, *Op. Cit*, p.36.

362 Mullerson, *Op. Cit*, p.36.

363 Bell, D. (2000) East Meets West Human Rights and Democracy in East Asia, Princeton, Princeton University Press, pp. 82-83.

364 McDougal, M. & Lasswell, H. (1959) The Identification and Appraisal of Diverse Systems of Public Order, 53 American Journal of International Law, p.1.

365 See generally Du Plessis, Max, (2010) The International Criminal Court that Africa Wants, Pretoria, Institute for Security Studies.

366 Dugard, J. (2013) Palestine and the International Criminal Court: Institutional Failure or Bias 11(3) Journal of International Criminal Justice, pp.563-570.

367 Simma, B & Alston, P, (1989) The Sources of Human Rights Law: Custom, Jus Cogens and General Principles, 12 Australian Year Book of International Law, p.82.

368 *Ibid.*

369 *Ibid.*

The approach has never demonstrated how a decision maker can resolve conflicts of interest and ideology grounded in the expectations of common interests of all relevant participants.370 Even the main proponents themselves such as Reisman, admit that there are challenges to the maintenance of a minimum and tolerant world public order.371 Reliance on reasonableness, wider shaping and sharing of values and minimum world public order of human dignity as a working criteria to achieve human good, fall foul to the rationality claims.372 The use of rules373 and norms374 interchangeably tend to be confusing.375 Rules prescribed by the methodology are deprived of normative character. Their complete permissiveness is difficult to follow, for instance where one rule permits what another rule prohibits.376 These rules are not truly prescriptive as they do not prescribe behaviour. There is a focus on extra-legal criteria of things making the law cease to exist as a normative order. There is little flexibility377 with misleading notion of law.378

2.3.2 FEMINISM

370 Schachter, O. (1971) Myers McDougal – An Appreciation, 1 Denver Journal of International Law and Policy, p.23.

371 Reisman, W.M (2000) The Vision and Mission of the Yale Journal of International Law, 25 Yale Journal of International Law, p.270.

372 Saberi, H. (2012) Love it or Hate it, but for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity, 35(1) Boston College International and Comparative Law Review, pp.7071

373 McDougal, M. (1955) The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale Law Journal, pp.648-710.

374 McDougal, M. & Schlei, N.A. (1960) The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security in McDougal *et. al*. (Eds.) Studies in World Public Order, New Haven, Yale University Press, p.843.

375 Anderson, S. (1963) A Critique of Professor Myers S. McDougal's Doctrine of Interpretation by Major Purposes, 57(2) American Journal of International Law, p.378.

376 *Ibid*.

377 *See generally*, McDougal, M. & Gardner, R (1951) The Veto and the Charter: An Interpretation for Survival, 60 Yale Law Journal, pp.258–292.

378 Anderson, *Op Cit*, p.382.

In the 1980s, a movement by feminist scholars primarily focused on the inclusion of women's rights in the field of international law was initiated 379 with the objective of assimilating women's concerns within the existing bodies of law. Eriksson has argued that the concerns were to the effect that the inclusion of women's rights into international law was not sufficient since the construction of the field of law was essentially male.380 For instance, Chinkin argues that women were excluded from international positions resulting in a body of international law that overlooked the concerns and perspectives of women. 381 Representation of women at the international level left a lot to be desired because there were few opportunities for women and men on equal terms to represent governments. 382 According to Hillary Charlesworth, women have endured a collective social history of deprivation of power and authority.383 There has been a universal oppression of women manifesting itself differently depending on culture. 384 Scholars such as Tickner 385 and Tannen 386 have argued that feminist method therefore, emphasizes conversation and dialogue rather than the production of a single triumphant truth.387 Such a method does not lead to neat legal answers because they are challenging the very categories of law and non-

379 Eriksson, M. (2011) Defining Rape: Emerging Obligations for States Under International Law, Leiden, Martinus Nijhoff Publishers, p.166.

380 *Ibid*.

381 Chikin *et. al*. (2005) Feminist Approach to International Law: Reflections from Another Century in Buss, D. (Ed.) International Law: Modern Feminist Approaches, Oxford and Portland, Hart Publishing, p.20.

382 CEDAW General Comment Number 23, para 38 on Political and Public Life, UN Doc. A/52/38 http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23, last accessed on 26 October 2013.

383 Charlesworth, H, *et. al* (1991) Feminist Approaches to International Law, 85 American Journal of International Law, p.613; Chappell, L, & Durbach, A, (2014) The International Criminal Court: A Site of Gender Justice?, 16(4) International Feminist Journal of Politics, p.533.

384 Charlesworth, H. (1993) Alienating Oscar? Feminist Analysis of International Law in Dullmeyer (Ed) Reconceiving Reality: Women and International Law, Washington DC, ASIL, pp.4-5.

385 Tickner, J.A. (1997) You Just Don't Understand: Troubled Engagements Between Feminists and International Relations Theorists, 41 International Student Quarterly, p.628.

386 *See generally*, Tannen, D, (1990) You Don't Understand: Women and Men in Conversation, New York, William Morrow.

387 Tickner,*Op. Cit*, p.628.

law.388 The approach seeks to expose and to question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis. When confronted with an issue, Charlesworth argues that the feminist approach seeks to excavate the issues like an archaeological dig where various layers of practices, procedures, symbols and assumptions are uncovered using different tools and techniques.389 Criticising the ICC treatment of women, K'Shaani has argued that when women enter into the focus of international law, they are viewed in a very limited way often as victims, particularly mothers or potential mothers in need of protection.390 The feminist proponents tend to push for a need to have women looked at in a balanced and non-stereo typed image.391 In order to achieve this, scholars such as Engle advocate the need to be clear on their own historical situation and understand how women involved in the human rights struggle might see them and recognise the complexities of and the context of other women.392 Further, feminists such as Braidotti observe and admit that there can never be common language but acceptance of an achievement of temporal political consensus on specific issues.393

388 Charlesworth, H. (1999) Feminist Methods in International Law, 93(2) American Journal of International Law, p.379.

389 *Ibid*, p.381; It has to be noted that Foucault also takes a similar approach of archaeological dig, *see also*, Cain, M, (1993) Foucault, feminism and feeling: What Foucault can and cannot contribute to feminist epistemology: Up against Foucault: Explorations of some tensions between Foucault and feminism in Ramazanoglu, C, (Eds.) Up against Foucault: Explorations of Some Tensions between Foucault and Feminism, Routledge, London, pp.73-86.

390 *See generally* K'Shaani O. S. (2011) Prosecutor V. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo 54 Howard Law Journal. p.476.

391 For long term effects of ignoring gender issues, *see generally*, SáCouto, S. (2012) Victim Participation At The International Criminal Court And The Extraordinary Chambers In The Courts Of Cambodia: A Feminist Project? 18 Michigan Journal of Gender and Law, pp.297-334; Oosterveld, V, (2014) Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court, 16(4) International Feminist Journal of Politcs, p.563.

392 Engle, K. (1992) Female Subjects of International Law: Human Rights and Exotic Other Female, 26 New England Law Review, p.1509.

393 Braidotti, R. (1992) The Exile, the Nomad and the Migrant: Reflections on International Feminism, 15 Women Studies in International Forum, p.710.

Charlesworth argues that feminists have been wary and critical about the implicit liberalism of dominant theories of international law. 394 They are suspicious of the idea that international law simply sets a platform on which various actors can pursue their cherished goals of good life. 395 International law tools and concepts create a class of outsiders (women)396 and a fundamentally male cast.397 Therefore, comparing between feminist and policy oriented approaches, there is a certain overlap. For instance, prominence given to the clarification of the observer's standpoint and a concern for the politics of identity398 feature highly in both approaches. Despite this, policy oriented jurisprudence has been attacked by feminists as being interested only in a very narrow understanding of standpoints, failing to attribute any significance to the sex of the observer and the gendered world of international law.399 Just like other approaches to international law, there is no recognition of the tension in existence between universal theories and local experiences.400 International law needs to be approached from the situated perspectives 401 of women whereby different life experiences are highlighted while at the same time recognising the collective social history of disempowerment, exploitation and subordination.402 If law is a 'human artifact' is it not relevant that its makers are almost invariably men and that they undervalue women403 in the process? Further, the approach's commitment to a world public order of human dignity fails

394 Charlesworth, H. (1994) Feminists Critiques of International Law and their Critiques, 13 Third World Legal Studies, p.2.

395 Koskenniemi, M. (2006) From Apology to Utopia: The Structure of International Legal Argument, Cambridge, Cambridge University Press, pp.66-69.

396 Charlesworth, H. *Op. Cit*, pp.1-2.

397 *See generally* Charlesworth, H., Chinkin, C. & Shelly, W. (1991) Feminist Approaches to International Law, 85 American Journal of International Law, p. 613; Chalresworth, H.(1992) Subversive Trends in the Jurisprudence of International Law, 86 Proceedings in Annual Meeting ASIL, pp.125-131.

398 Charlesworth, *Op Cit*, p.392.

399 *Ibid.*

400 Charlesworth, *Op. Cit*, p.12.

401 Bradiotti, R. (1992) The Exile, the Nomad, and the Migrant Reflections on International Feminism, 15 Women Studies International Forum, p.9.

402 Mackinnon, C. (1991) From Practice to Theory, or What is White Woman Anyway?, 4 Yale Journal of Law and Feminism, p.15.

403Mouthaan, S. (2013) Victim Participation At The ICC For Victims Of Gender-Based Crimes: A Conflict Of Interest? 21 Cardozo Journal of International and Contemporary Law, p.649.

to consider the gendered dimensions of the notions of order and human dignity. The underpinnings of the order promoted and the model of humanity being relied on is not expressly stated. The same human goods that a community cherishes are systematically denied to women.404 There are massive violations that women suffer around the world namely, varying rights of voting405, holding public office406, epidemic levels of sexual violence and use of rape as a weapon for war407 and punishment408, denial of reproductive freedom 409 , inequality in access to education 410 , employment 411 , healthcare 412 , housing413 and financial status.414 It is therefore argued that this in the end is likely to be an order or humanity that focuses more on men and is not gendered. Thus the functional analysis that policy oriented jurisprudence promotes has values cherished by men and not relevant to women. It does not respond to women and their concerns. What the approach does is devalue or marginalize women's experiences. Policy oriented jurisprudence needs to consider and

404 Charlesworth, *Op. Cit*, p.12.

405 See generally, Diner, C. & Toktas, S. (2010) Waves of Feminism in Turkey: Kemalist, Islamist and Kurdish Women's Movements in an Era of Globalization, 12(1) Journal of Balkan and Near Eastern Studies, pp.41-57.

406 *See generally*, Verge, T. (2012) Institutionalizing Gender Equality in Spain: From Party Quotas to Electoral Gender Quotas, 35(2) West European Politics, pp.395-414.

407 *Prosecutor –v- Jean Paul Akayesu*, International Tribunal for Rwanda Case Number 96-4-T (where it was held that a communal leader's encouragement of rape and sexual abuse of Tutsi women was an aspect of genocide in the context of Rwanda); *Prosecutor –v- Bemba*, conviction judgment held that rape was used as a weapon of war.

408 Henry, N. (2013) The Fixation on Wartime Rape: Feminist Critique and International Criminal Law, Social and Legal Studies, pp. 1-19.

409 Siegel, R.B (2013) Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg, 25 Columbia Journal of Gender and Law, p.63.

410 See generally, Unterhalter, E, Heslop, J, Mamedu, A. (2013) Girls Claiming Education Rights: Reflections on Distribution, Empowerment and Gender Justice in Northern Tanzania and Northern Nigeria, 33 International Journal of Education Development, pp.566-575.

411 Schultz, V. (2009) Feminism and Workplace Flexibility, 42 Connecticut Law Review, p.1203.

412 Mohapatra, S. (2013) Under the Knife: Health Law, Health Care Reform and Beyond: Global Legal Responses to Prenatal Gender Identification and Sex Selection, 13 Nevada Law Journal, p.690.

413 Becky, J. (2011) Unbound by theory and naming: survival and feminism and the women of South African Victoria Mxenge Housing and Development Association, 26 Berkeley Journal of Gender, Law and Justice, p.19

414 Shelley, W. (1994) Women and the Global Economic Order: A Feminist Perspective, 10 American University International Law Review, p.861.

reflect on the fact that international law and policy is a domain for males and women are clustered in its 'softer corners' where there is more feminine and human interest subjects such as refugee law and human rights.415 Women should therefore also engage in the 'harder corners' such as international criminal law, witness protection and relocation. The transformative potential of international law and concerns for women need to be embraced. Accordingly, Charlesworth concludes that policy-oriented jurisprudence does not afford an opportunity to achieve that potential transformation of filling the gaps and unpacking the hidden values that international law decision-making accords to women.416

2.3.3 CRITICAL LEGAL STUDIES (CLS)

Critical Legal Studies originates from a concern with the relationship of legal scholarship and practice to the struggle to create a more human egalitarian and democratic society.417 CLS scholarship has been influenced by a variety of currents in contemporary radical social theory but it does not reflect any agreed upon set of political tenets or methodological approaches.418 In essence it rejects any obsessive respect for disciplinary boundaries and narrowly focused research. Thus according to this movement, there should not be one method or approach to international law specifically419, what works as a professional argument depends on the circumstances at a particular time or occasion.420 Therefore, there is no possibility of limited objectivity in policy-oriented jurisprudence. For instance, although there are eight values that are identified by NHS theory as the goals of a community world order, CLS proponents argue that these values are vapidly general and over-inclusive and

415 Brooks, R.E (2002) Feminism and International Law: An Opportunity for Transformation, 14 Yale Journal of Law and Feminism, p.346.

416 Charlesworth, H. (2002) The Hidden Gender of International Law, 16(1)Temple International & Comparative Law Journal, pp. 95-97; *see also Ibid*, p.351.

417 Kennedy, D. & Klare, K (1984) A Bibliography of Critical Legal Studies, 94 Yale Law Journal, p.461.

418 *Ibid.*

419Koskenniemi, M. (1999) Letter to the Editors of the Symposium, 93(2) American Journal of International Law, pp.351-361.

420 *Ibid*, p.356.

seem to be synonymous with western, liberal and constitutional values.421 How then do proponents of policy-oriented jurisprudence expect such values to be applicable to a world community when in essence they are an agenda of the western world? It is therefore argued that the already explained diverse views of world public order already being manifested by the political and legal divide422 between the ICC and the AU speaks volumes of the non-applicability of these values. Accordingly, CLS inverts international law in order to emphasise the multiple perspectives of its participants. The relevant decision makers are individuals and their decisions are highly personal, thus cannot be influenced by some type of methodology or approach. They choose different methods and modes of argument as "styles," ways of being that reflect choices ranging from types of friends to the most effective means of taking pragmatic action. Therefore, the law does not exist to be perceived differently by these different decision makers; they instead constitute the law for multiple purposes and from multiple perspectives. 423 From a CLS perspective, international law appears solipsistic 424 and blind to the plain facts of reality and not even policy-oriented jurisprudence can address them competently. CLS advocates for the effects of law and not merely postulating absences to be filled but also points out the lack of effectiveness in law. For instance, to a policy-oriented theorist, a desired goal for a community's wealth can be right to food, but to the CLS, the poor need food not simply the right to food. Likewise, a witness before the ICC needs protection and not just the right to be protected. Just like any other school of thought, policy oriented jurisprudence should be aimed at objectivity, neutrality and determinacy of international law as a way of disguising or evading responsibility but should focus on technical expertise rather than moral accountability.

421 Trimble, P. (1990) International Law, World Order and Critical Legal Studies, 42(3) Stanford Law Review, p. 814.

422 http://iccforum.com/africa, last accessed on 25 October 2013; http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/, last accessed on 25 October 2013.

423 Koskenniemi, M., *Op. Cit*, p.356.

424 See generally Beckett, J. (2012), Critical International Legal Theory, Oxford, OUP; Becket, J. (2006) A Rebel Without a Cause? Marti Koskenniemi and the Critical Legal Project, 7(12) German Law Journal, pp.1045-1047.

2.3.4 LAW AND ECONOMICS (L & E)

To proponents of law and economics, international law is partly a set of norms expressing individual, rather than state, values. This conclusion flows from their commitment to methodological individualism, leading them to focus on the state only as a mediating institution rather than as an autonomous entity with its own normative value. 425 The methodology takes no position on the content of individual values, either singly or as aggregated by the state. It thus focuses on the functionalist dimension of international law, rules designed to achieve whatever norms are adopted. Guiding questions that point towards solutions to international law problems, according to its proponents are: (a) what the proscription should be, (b) to whom it should apply, (c) by whom it should be enforced, and (d) what the penalties should be. 426 The lawyer's task is to identify the right incentive structure to motivate the desired behaviour, through either prohibition or inducement, and then to design rules and institutions that will maximize compliance. Economics as a study of rational choice under conditions of limited resources427 assumes that individual actors seek to maximise their preferences by choosing the best means to the chooser's ends.428 In the same vein, economic analysis of international law is more than a cost-benefit as it is a transaction cost analysis, 429 price theory, public choice and game theory. 430 These economic law theories substantially overlap each other.431 Further, there is vast literature on these theories and this discussion only focus on thumbnail analysis of price, transaction cost economics, game and public choice techniques. This is so because these economic law

425 Dunoff, J. & Trachtman, J. (1999) The Law and Economics of Humanitarian Law Violations in Internal Conflict, 93(2) American Journal of International Law, p.394.

426 *Ibid*.

427 *Ibid,* p.395.

428 Posner, R. (1999) Rational Choice, Behavioural Economics and the Law, 50(5) Standard Law Review, pp. 1551–1552.

429 Aceves, W. (1996) The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice, 17(4) University of Pennsylvania Journal of International Economic Law, p.1002.

430 Chinen, M. (2001-2002) Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner, 23 Michigan Journal of International Law, pp.184-185.

431 Dunoff, J. & Trachtman, *Op. Cit,* American Journal of International law, p.395.

theories formalize,[432] extend and allow insights into the familiar environment of most international lawyers. They also provide firmer and less subjective basis for analysis.[433] Thus economic analysis of international law allows international lawyers to focus on relevant variables, generate hypothesis and test them in order to render transparent the distributive consequences of legal rules. *Price theory* is the basic tool of neoclassical economics.[434] It is based on the assumption that determination of prices, outputs and income distribution in markets is carried out in accordance with rational strategies for the maximization of utility of demand and supply.[435] A mathematical analysis as to the equilibrium of supply and demand simply asks whether there is another option that would make at least an individual actor (in his or her own perception) better off without making anyone else worse off. [436] A follow up question would be whether such an individual actor would be better off and have sufficient surplus to compensate those made worse off?[437] Another analytical technique employed is the *transaction cost economics* whereby two or more parties contracting with one another costless reach an equilibrium outcome without government or outside intervention or simply put it is the cost of participating in a market or enforcing a contract.[438] It influences parties to make possible and exhaustive agreements that cover or regulate cause of the parties' relationship.[439] Through this cost, prince theory is refined by including consideration of the cost of identifying potential trans-actors, negotiating agreement and enforcing agreement.[440] *Game theory* provides for an analysis of strategic interactions-the choices that actors make

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432 Formalization is very crucial to this analysis as it allows an international lawyer to focus on relevant variables, generate hypotheses and empirically test such hypotheses.

433 Dunnoff & Trachtman, *Op. Cit,* American Journal p.395.

434 Colander, D. (2000) The Death of Neoclassical Economics, 22(2) History of Economic Thought, pp. 132 - 135

435 Campus, A. (1987) Marginal Economics in Eatwell, J., Milgate, M., & Newman, P. (Eds.) The New Palgrave: A Dictionary of Economics, Volume 3, London, Macmillan, p.323.

436 Dunnoff & Trachtman, *Op. Cit,* p.395.

437 *Ibid.*

438 Pejovich, S. (1995) Economic Analysis of Institutions and Systems, Dordrecht, Kluwer Academic Publishers, p.84.

439 Aceves, *Op. Cit,* p.1002.

440 Dunnoff & Trachtman, *Op. Cit,* pp.395-396.

when they realize that outcomes partly depend on decisions made by others.441 It provides for a rigorous but simplified framework for examining dynamics of informal social control.442 For instance, an analysis of game theory can guide a strategic decision for a State Party pursuant to the Rome Statute443 to enter into an agreement with the international criminal court and allow witnesses to be hosted or relocated to that particular state party if there is a likelihood that other states parties will similarly enter into agreements with the international criminal court and host or allow relocation of witnesses to such states. Or further, if such entry into agreement will have a likelihood of another state party financing the expenses of hosting or relocating a witness in a third party state.444 Basically decisions are adopted due to how one individual or party expects or predicts another to act in response.445 *Public choice* applies economic tools to decision making outside of markets such as nature of legislative process or collective political process.446It treats the law making process as a micro-economic system and law as goods supplied to the highest bidders.447 Thus, it is a positive theory that gives rigorous and predictive account of the world. 448 Small and concentrated interest groups are likely to succeed in resource mobilization and legislative influence than large groups with equal aggregate interests due to informational and organizational costs.449 It can be used to analyse treaties, for instance, it has been argued that

441 *Ibid.*

442 Ellickson, R. (1998) Law and Economics Discovers Social Norms, 27 Journal of Legal Studies, p.547.

443 Article 93 of the Rome Statute.

444 Article 96 of the Rome Statute.

445 *See generally* Baird, D, Gester, R., & Picker, R. (1998) Game Theory and the Law, Harvard, Harvard University Press.

446 Skeel, D. (1997) Public Choice and the Future of Public – Choice Influenced Legal Scholarship, 50 Vanderbilt Law Review, p.647.

447 Dunnoff & Trachtman, *Op. Cit*, pp.395-396.

448 Stephen, III., & Paul, B. (1994-1995) Barbarians Inside the Gate: Public Choice Theory and International Economic Law, 10 American University Journal of International Law and Policy, p.745.

449 Dunnoff & Trachtman, *Op. Cit*, p.395.

states comply with international law only when it is in their interest and not for other legal or moral reasons.450

From the discussion above, there is an assumption that functional dimension of international law and rules is designed to achieve whatever norms are to be adopted.451 Contrary to positivist theoretical approach to international law,452 Trachtman argues that individuals are the ultimate source of those norms.453 Therefore, ICC decision-makers are tasked to identify the right incentive and structure to motivate a better system of witness protective measures. According to this approach, it can be argued that witness protection cooperation strategies need to be either prohibitive or inductive.454 Maximum compliance of ICC requests and rules as regards witness protection should be the goal of the Court and its states parties. Rational choices455 should be the guiding point for rule interpretation, policy formulation, and implementation of protective measures. From this premise, it is therefore suggested that the multi-method approach that policy oriented jurisprudence employs cannot provide satisfactory explanations and contextualization of the challenges 456 that witness protection system is facing at the ICC. It cannot solve cooperation, relocation, intra-organ coordination, psychological and physical security issues of the protection system at the Court. The approach asks many questions457, it provides no satisfactory explanations of why those are

450 Rao, N. (2011) Public Choice and International Law Compliance: The Executive Branch Is a "They", Not an "It", 96 Minnesota Law Review, p.201.

451 Trachtman, J.P (1997) The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis, 17 North-western Journal of International Law and Business, pp. 535-538.

452 Koh, H.H, (1997) Review: Why Do National Obey International Law, 106 Yale Law Journal, pp.2608-2613.

453 Trachtman, *Op. Cit*, Northwestern Journal of International Law and Business, pp.535-538.

454 Kayuni, S, *Op. Cit*, UCL Law and Jurisprudence Journal, p.291.

455 Posner, R, (1999) Rational Choice, Behavioural Economics and the Law, 50(5) Stanford Law Review, p.1551.

456 Dunoff & Trachtman, *Op. Cit*, p.399.

457 *Ibid.*

the right questions and with stronger contextualization.458 For instance, for the mapping process and human good analysis to take effect, there is no explicit rationale and contextualization 459 that would compare to the economic rationality of human beings. Further, there are limits to the approach's analytical techniques. There is an assumption of underlying substantive values that a community lacks without a cost and benefit analysis added to such assumptions. Therefore, law and economics analysis has described the approach as just good at offering rich and influential vocabulary without distinguishing clearly between law and politics.460

2.4 DEFENDING POLICY ORIENTED JURISPRUDENCE: THE EFFECTIVE METHOD THAT THE ICC'S PROTECTIVE MEASURES NEED

The discussion above has addressed the theories that are critical of policy oriented jurisprudence but also such theories that can appropriately answer the non-procedural witness protective measures research questions in this study. The question that this study addresses is whether policy oriented approach can be used to interpret witness protection measures, which are available in the legal framework of the ICC. Despite the demonstrated shortfalls of policy oriented approach, it is the argument in this thesis that the approach has the potential of positively and effectively contributing to the interpretation and implementation of witness protective measures. From its inception, McDougal and Lasswell pointed out that a positivist rule-based approach was incomplete and sometimes irrelevant and not applicable to contemporary world.461 The inability of the positivist rule based approach to appreciate law as not just rules but the whole process of decision-making propagated the new approach.462 It is suggested that strict interpretation of the Rome Statute and the ICC RPE regarding

458 Dunoff, L & Trachtman, J. (1999) Economic Analysis of International Law, 24 Yale Journal of International Law, pp.28-36.

459 On a discussion of legal subjects being economically rational see generally Blaug, M. (1992) The Methodology of Economics or How Economists Explain, Cambridge, CUP, p.229.

460 Dunoff & Trachtman, *Op. Cit*, p.408.

461 Trimble, P., *Op. Cit*, p.815.

462 Higgins, R, (1968) Policy Considerations and the International Judicial Process, 17(1) International and Comparative Law Quartely, pp.58-84.

witness protection cannot ameliorate the difficult circumstances of vulnerable witnesses. ICC duty to protect witnesses is more than rules that positivism adheres to. As it will be demonstrated in chapter four on the actual practice of the ICC as regards witness protection, the buty of the ICC is about protection of vulnerable witnesses. Policy considerations need to play a crucial role. Accordingly, the Rome Statute and the ICC RPE have to be appreciated as dynamic and integrated process of decision-making.463 In McDougal's argument against positivist rule based approach, the law operates at many different community levels.464 Further, it operates through many different institutional devices. Such an approach enables resolution to problems, impact on policies and influencing an understanding of decision-making processes.465 As demonstrated in the chapter four discussion, the ICC as an institution with its witness protection system operates on an international arena. It depends on the collaboration and cooperation of the world community of states parties and their varied national institutions. This policy oriented approach is necessary for the promotion466 of a properly organised ICC witness protection system that easily serves the good of humanity. It is therefore the right method for this study as it introduces insights from legal realism and pragmatism. From the proceeding discussion of recommendations, it will be demonstrated that the theory further joins law with politics, emphasizing the role of policy, its interpretation and importance of context. Such an approach gives the ICC witness protection system an opportunity to expand the horizons of inquiry beyond rules.467 As will be demonstrated in Chapter three of this study, the Court has an opportunity to learn from practices of national jurisdictions, namely civil and common law jurisdictions, and interface between its practice and that of states parties to the Rome Statute. For instance, the nature of witness protection requires pragmatism as it is a very delicate and sensitive arena for the credibility and

463 McDougal, M,S, (1959) The Impact of International Law Upon National Law: A Policy-Oriented Perspective, 4 South Dakota Law Review, p.25.

464 McDougal, M, S, (1966-1967) Jurisprudence for a Free Society, 1 Georgia Law Review, pp.1-19.

465 Reisman, W, M, *et. al*, *Op. Cit*, Yale Journal of International Law, p.577.

466 McDougal, M & Feliciano, F. (1959) Legal Regulation of Resort to International Coercion: Aggression and Self-Defence in Policy Perspectives, 68(4) Yale Law Journal, p.1057.

467 Timpson, F. (1974) The Lasswell – McDougal Enterprise: Towards a World Public Order of Human Dignity, 14 Virginia Journal of International Law, p.535.

protection of human security.468 Further to this, the ICC sits at the critical juncture of world politics469 where antagonistic views among the organs470 of the court and even states parties inevitably require serious considerations of context and policy alternatives.471

It is unwise to underestimate the role that law presently plays in the world power process. Further, the role that an effective organization can play in maintaining the values of a free, peaceful and abundant world society cannot be taken lightly.472 It does not have to be a 'conformity-imposing textuality'473 or insistent emphasis upon an impossible to enable a proper interpretation of the witness protection measures within the Rome Statute. The question is whether policy-oriented approach can enable a critical examination of the protective measures. Though other methods described in this chapter can also serve the interests of witness protection, it is argued that a policy-oriented approach can perform this role better. This is so because the approach has a realistic analysis with its own functionality. From the discussion in Chapter five on recommendations, it can be clearly seen that this functionality has the potential of unpacking of each and every value that a community in favour of effective witness protection measures upholds. Therefore, every human being's demand for security and protection in the sense of freedom from expectations of violence, power, *respect*, enlightenment, freedom and opportunity to pursue higher standards of living or *wealth*, health, *well-being* or comfort, *rectitude* and congenial personal relations or

468 Balasco, L.M (2013) The International Criminal Court as a Human Security Agent, 28 Fletcher Journal of Human Security, p.46

469 Murith, T. (2013) The African Union and the International Criminal Court: An Embattled Relationship, 8 Policy Brief, Pretoria, IJR, p.3; Orentlicher, D.F (1999) Politics by other Means: The Law of the International Criminal Court, 32 Cornell International Law Journal, p.489; Danner, A.M (2003) Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel, 55(5) Stanford Law Review, p.1633.

470 Eikel, *Op. Cit*, p.97.

471 Witness and Victims Protection Unit of the International Criminal Court , http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witness%20unit.aspx , last accessed on 25 October 2013.

472 McDougal, M. (1952) Law and Power, 46 American Journal of International Law, p.102.

473 McDougal, M. (1967) The International Law Commission's Draft Articles Upon Interpretation, Textuality Redivivus, 61 American Journal of International Law, p.992.

affection can be achieved through this functionality.474 These demands are conditioned by increased exposure to some attitudes.475 These attitudes may be in form of information before decision-makers and witnesses. Further, growing common skills such as training and awareness that all witnesses need security and protection, can condition such demands. Identification of witnesses from locality to world community as serious players in world justice and the struggle to end impunity can also serious considerations of witness needs

The approach is relevant and deserving an opportunity. This is so because a rule-based approach is often incomplete, irrelevant and inapplicable to a contemporary world476 such as the ICC witness protection current challenges. In short, such rule-based approach does not mirror the realities of how law comes into being, enforced and revised or amended. It is an approach that international criminal justice needs.477 It is a method that blends rule and policy in the process substituting obscure words for familiar concepts. For instance, in terms of 'effective planning process to decision making', it is easier to study and appraise conditions and trends of people, values, institutions, technology, and resources; the invention or adaptation of appropriate means to secure established goals; assisting in the execution of programs and in evaluating the effects of action.478 These concepts among others are likely to make sense and not cause chaos, since the optimum goal is the welfare maximization479 of witnesses' security and protection. Further, decision makers will find it easy to use the approach to analyse and devise the best possible bilateral and multilateral cooperation agreements with states parties in terms of hosting relocated witnesses, highlighting role of

474 McDougal, M. (1948-1949) The Role of Law in World Politics, 20 Mississippi Law Journal, p.254.

475 Lasswell, H. (1946) The Interrelations of World Organization and Society, 55 Yale Law Journal, p.889.

476 Wiessner, S, (1998-1999) Professor Myres Smith McDougal: A Tender Farewell, 11 St. Thomas Law Review, p.203.

477 Kayuni, S, *Op. Cit*, UCL Law and Jurisprudence Journal, p.292.

478 McDougal, M. (1947) Foreword: Regional Planning and Development, The Process of Using Intelligence, Under Conditions of Resource and Institutional Interdependence for Securing Community Values, 32(2 Iowa Law Review, p.196.

479 McDougal, M. (1947) The Law School of the Future: From Legal Realism to Policy Science in the World Community, 56 Yale Law Journal, p.1348.

policy and relevance of contextualization as regards witness protection measures.480 Thus in doing this, functional analysis481 would help decision makers consider among other issues, what value is best applicable to the situation. It is argued that all that is important with witnesses is their protection at all times.482 Purposive and enlightening483 interpretation of protective measures within the arena of authority need to aspire to a focused 484 and established minimum order where violence against such witnesses is not given a chance but only an effective and widely accepted possible attainment of human dignity both national485 and international platform.

Witness protection under the ICC legal framework486 is a vital constituent element in the struggle to end world impunity as it secures crucial testimony before court.487 Therefore, witness protection and the approach are complementary of each other. In as far as attainment of human good as a universal value is concerned, conceptual categories are logically exhaustive but empirically open.488 ICC's role in contributing towards a free and peaceful world community cannot be taken for granted.489 The approach will give insights into how the decision-making process of witness protection measures is undertaken by the ICC.

480 Timpson, F, (1974) The Lasswell-McDougal Enterprise: Towards a World Public Order of Human Dignity, 14 Virginia Journal of International Law, p.535.

481 Reisman, *Op. Cit*, p.4.

482 Article 68(1) of the Rome Statute.

483 Trimble, *Op. Cit*, p.818.

484 Reisman, M.,W (1999 - 2000) International Legal Response to Terrorism, 22 Houston Journal of International Law, p.9

485 Suzuki, E. (2010) The New Haven School of Jurisprudence and Differential Responsibility of Major Powers in International Financial Institutions, 18(1) Asia Pacific Law Review, pp.4–9.

486 Article 68 of the Rome Statute.

487 Reydberg, A., (1999) Case Analysis: The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC, 12(2) Leiden Journal of International Law, pp.445-478.

488 Wiessner, S, & Willard, A, (1999) Policy Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Towards a World Public Order of Human Dignity, 93(2) American Journal of International Law, p.318.

489 Ku J, & Nzelibe, J, (2006) Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities? 84(4) Washington University Law Review, p.777.

Further, feminism is restrictive as it only focuses on gender or women concerns. Perceptions of the law differ dependent on one's own standpoint as a decision-maker.490 For instance, 'the law' cannot be looked at from the same angle if one though a woman, is an actual witness seeking protection, an actor handling such a witness at the ICC or an observer from the NGO cooperating with the ICC. As challenges to witness protection will be demonstrated in both chapter three on the history of witness protection and chapter four on the ICC witness protection practice, witness protection is more than just women. Accordingly, it is further suggested that those entrusted with decision-making may have varied viewpoints of the law dependent on the legal cultural background, class, education, age, life experiences. Far as Women are not the only witnesses that, appear before the ICC or seek protection from the ICC witness protection system. There is therefore a need to have a contextual approach to law that has considerations of policy in it since children and men can also be witnesses in need of protection before the ICC.

In addition to the above, it is argued that every role that a decision-maker plays has to be considered in corollary perspective. 491 Thus, a scholar, an employee of the ICC, an employee of a state party, a judge, an accused, a victim or witness will act differently in different roles. Critical legal scholars argue that decision-making is different in institutionalized and non-institutionalized settings. 492 An individual scholar's decision-making cannot be the same as an ICC official's decision-making. Therefore, as chapters three and four will demonstrate, decision-makers committed to the human good of witnesses have different variations in perceptions attendant to each perspective and role. They must therefore choose practices, policy formulations, legal interpretations and witness protective measures implementation strategies that are appropriate to the task before them and at that particular time. There is always need to connect law with policy context.493Some eminent modern deconstructionists such as Martti Koskenniemi's have described it as the world's most visible

490 Wiessner, S, & Willard, A, *Op. Cit,* American Journal of International Law, p.322.

491 *Ibid.*

492 Koskenniemi, M, (1999) Letter to the Editors of the Symposium, 93 American Journal of International Law, p.351.

493 Wiessner, S, & Willard, A, *Op. Cit,* American Journal of International Law, p.322.

but least influential of approaches to international law.[494] He still positively acknowledges that though many find it difficult to accept its theoretical expositions and feel that its idiosyncratic language is alien[495], the approach's assumptions about relatedness of law and politics[496] are an effective reflection of a close relationship between community and authority. Authority is central to emergence and sustenance of legal norms. Therefore, authority assumes the existence of a community[497] in a cumulated package of past decisions called rules.[498] In order to research and study such a community and how authority is incorporated in the complex social process of the law[499], the approach provides an ideal platform.[500] This platform accords the decision maker control and security of a desired pattern of behaviour in others.[501] The approach is the only methodology that offers substantive policy goal[502] analysis and formulation[503] for decision-making. This can enable possible solutions to the ICC's legal, interpretive and operational challenges to witness protection.[504] These challenges warrant policy analysis and formulation considering that the ICC is a treaty based court with no enforcement mechanism that heavily relies on the

494 Koskenniemi, M. (2001) The Gentle Civilizer of Nations: The Rise and Fall of International Law, Cambridge, CUP, p.475.

495 *Ibid.*

496 Mullerson, R. (2002) Martti Koskenniemi. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 -1960, 13 European Journal of International Law, p.732.

497 Addis, Adeo (2010) Authority and Community, 18(1) Asia Pacific Law Review, p.63.

498 Higgins, R. (1991) International Law and Avoidance, Containment and Resolution of Disputes, 230 Receuil Des Cours, p.25.

499 McDougal, M & Reisman, M. (1965) The Changing Structure of International Law: Unchanging Theory of Inquiry, 65 Columbia Law Review, p.813.

500 Wanguang, Li (2010) A New Perspective on International Economic Law and the Use of the Intellectual Framework of the New Haven School of Jurisprudence, 18 (1) Asia Pacific Law Review, p.73.

501 Reisman, M. (1971) Nullity and Revision: The Review and Enforcement of International Judgments and Awards, New Haven, Yale University Press, p.4.

502 Rodell, F. (1947-1948) Legal Realists, Legal Fundamentalists, Lawyer Schools, and Policy-Science – Or How Not to Teach Law, 1 Vanderbilt Law Review, p.7.

503 McDougal, *Op. Cit*, p.258.

504 http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf last accessed on 25 October 2013.

cooperation of both states parties and third party states505 on the one hand and cooperation among its organs506 on the other. Witness protection and relocation cannot work if there is lack of cooperation from both outside and within the court.

Another reason why this work grounds its theoretical framework in the approach is because it intends to make a constructive contribution to a highly contested but so far, very limited507 academic dialogue about witness protection and relocation. The approach offers the opportunity to incorporate an array of perspectives that can potentially encourage conversation about witness protection and indicate an international law forward. Witness protection is becoming both contentious and critical to the ICC.508 The unique approach that policy oriented considers can be vital to an analysis of keys decisions regarding witness protection have been made and should be made in future. Its multi-method and structural tools can provide an opportunity for evaluation of past contentious witness protection decision-making such as the case of *Ngudjolo Chiu*509 and current issues before the court including the tampering with witnesses in the case of *Barasa*.510 As demonstrated in the introduction to this jurisprudence above, and evidenced by the proceeding discussion in chapters three, four and five, this is the only approach that has structural framework and tools for past and current considerations. The witness protection controversies that have muddled trials at the Court to the extent of affecting other ongoing trials can be examined through a new lens.511 Apart from according decision-makers with a roadmap for analysis of past

505 Gilligan, M. (2006) Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime, 60(4) International Organization, p.935.

506 OTP, PTC, TC, VWU; Eikel, *Op. Cit*, p.97.

507 Eikel, *Op. Cit*, p.98.

508 Beresford, S. (2005) Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?, 3(3) Journal of International Criminal Justice, p.721.

509 *Prosecutor –v- Mathieu Ngudjolo Chiu* Case Number ICC-01/04-02/12.

510 *Prosecutor –v- Walter Osapiri Barasa* Case Number ICC-01/09-01/13.

511 The OTP withdrawal of Kenyatta Case due to witness tampering, harm and intimidation, has to a certain extent affected the ongoing trials on the Kenyan Situation such as the Ruto Case, *see also* Murithi, T, (2015) Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan, 40(2) Africa Development, pp.73-97.

trends in witness protection measures, this approach offers alternatives that can generate strategies for better protection of witnesses. Decision-makers can ably and flexibly identify relevant recommendations taking the form of law, guidelines, principles, articulated practices and shares expectations, applicable to every individual witness circumstances.512

The functioning mapping process is problem-oriented513 and can ably resolve contemporary understandings of human security focused on individuals 514 such as ICC witnesses as opposed to traditional approaches to international law and international legal order.515 It is suggested that this is an interpenetration of norms of decision-making while appreciating varied social and political environments 516 through which ICC's witness protective measures operate. The provocative and simulative intervention of the approach as regards international law decision-making,517 promotes the law function as a proper structure of guiding rules and principles.518 Human good is the ultimate focus and peak of the struggle of man's basic human values.519 Further, this thesis suggests that protection and security of ICC witnesses is the contemporary zenith of the Court's witness protection system. Security and protection of people is a matter that requires urgent international monitoring.520 What counts in modern international law is securing appropriate measures for the protection of witnesses. Possible achievement of these appropriate protective measures is through an all-

512 Kayuni, S, *Op. Cit*, UCL Law and Jurisprudence Journal, p.295.

513 Querim, Q, (2012) Development in International Law: A Policy-Oriented Inquiry, Leiden, Martinus Nijhoff, pp.7-9.

514 Oberleitner, G, (2005) Human Security: A Challenge to International Law? 11(2) Global Governance: A Review of Multilateralism and International Organizations, pp.185-203.

515 *Ibid.*

516 MacChesney, B, (1971) Myres McDougal, 1 Denver Journal of International Law and Policy, p.21.

517 *Ibid.*

518 Wood, R, S, (1973-1974) Public Order and Political Integration in Contemporary International Theory: The Lasswell-McDougal Approach, 14 Virginia Journal of International Law, p.423.

519 McDougal, M, *et. al*, (1949-1950) Rights of Man in the World Community: Constitutional Illusions versus Rational Action, 59 Yale Law Journal, p.60.

520 Snyder, R, Hermann, C, & Lasswell, H, (1976) A Global Monitoring System: Appraising the Effects of Government on Human Dignity, 20 International Studies Quarterly, p.221.

encompassing inquiry that has an integrated context approach521 exerting new and probable influence on the contemporary global order. 522 Such an inquiry is a process of communication 523 that focuses on the rule purpose and process 524 that the world community of ICC states parties' value. When a decision-maker uses this universal toolkit,525 he or she is likely to understand and shape the law on ICC witness protective measures. There is a higher degree of grasping the realities of such law, how it works as well as its operating arena. This will help clarify526 policy perspectives and community goals527 of the ICC's witness protection system.

Notwithstanding the above, it is therefore argued that the approach makes a provision to ease the gridlock or hold-up by situating important insights from other theories of international law namely liberal focus of power and purpose of the international law528 or a conservative focus of international law as law.529 This is done within a framework for understanding and refining the international legal system to solve actual problems of witness protection. In the central case of the international legal system within which the ICC operates, the OTP, VWU and PTC and TC on the one hand and states parties and third party states on the other, all of

521 Lasswell, H, & McDougal, M,S, *Op. Cit*, Yale Law Journal, p.203.

522 Koh, H,H, (2009) Michael Reisman, Dean of New Haven School of International Law, 34 Yale Journal of International Law, p.504.

523 Reisman, W,M, (1981) International Law Making: A Process of Communication, 75 American Society of International Law Proceedings, p.866.

524 Reisman, W,M, (1990) Sovereignty and Human Rights in Contemporary International Law, 84 American Journal of International Law, p.866.

525 Wiessner, S, (2010) The New-Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping Law, 18(1) Asia Pacific Law Review, p.47.

526 McDougal, M,S, (1974) Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies, 14 Virginia Journal of International Law, p.406.

527 Wiessner, S, (2009) Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman, 34 Yale Journal of International Law, p.526.

528 *See generally* O'Connell, E.M. (2008) The Power and Purpose of International Law: Insights From the Theory and Practice, OUP, New York.

529 Mathias, D.S, Roberts, A. & Vazquez, C. (2009) An Introduction: International Law as Law, 103 American Society of International Law Proceedings, p.1.

them being decision-makers, should identify relevant prescriptions530 which may take the form of law, guidelines, principles, articulated practices and shared expectations. The flexibility that the jurisprudence affords should be able to help these decision-makers interpret and apply those prescriptions to facts before them or facts applicable to each and every witness' individual circumstances. Finally, the decision-makers have to make a decision about which interpretation to follow, or to ignore or change the prescriptions altogether. Other decision-makers outside the ICC should be able to respond to that claim with their own claims interpreting prescriptions. Eventually, decision-makers both inside and outside the court may agree on an interpretation, resulting in an outcome to the protective measures of witness protection at the ICC. This consensus on relevant prescriptions will help to guide further conduct and shape outcomes in other related problems, subject to further interpretations by decision-makers.531

A comprehensive and systematic study and redefinition of witness protection and the right to protection offers fertile ground for legal and policy responses532 designed to bring about safety and witness protection at the same time achieving the ends of justice. Decision-makers inside the ICC should be able to competently analyse the impact of their options and approaches that will shape the future of witness protection in international criminal law. For instance, in the context of the judges in both the TC and PTC, it is considered that effective protective measures are aimed at having a well-coordinated and smooth trial that ends up contributing towards ending impunity and achieving justice.533 Not only will this secure the confidence of witnesses in the system but it will also improve cooperation with both states parties and third party states. Further, there are other additional actors534 that play a crucial

530 Cheng, Tai-Heng, (2012) When International Law Works: Realistic Idealism After 9/11 and the Global Recession, OUP, Oxford, pp.295-296.

531 *Ibid.*

532 See generally Qerim, Q. (2012) *Op. Cit*,

533 *Katanga and Ngudjuilo Cases*; *Lubanga Case.*

534Policy Oriented Jurisprudence names the following as actors with no formal power in international legal system: individual human beings; nation-states; intergovernmental and transnational organizations; transnational political parties and orders; transnational pressure groups and gangs; transnational private or official associations oriented towards values other than power; and civilizations and folk cultures; Osofsky, H., *Op. Cit*, p.603.

role to witness protection decision-making. Thus the approach affords the opportunity for an analysis of their behaviour as they lack formal power in international legal system but play a critical role in international law making. In the context of this study, examples of these additional actors are non-governmental organizations that coordinate witness and victim protection on the ground 535 , individuals 536 , official associations and transnational organizations such as Interpol.

Although this study concerns events that lead to violence, grave and egregious crimes and loss of lives, war studies have confirmed that many of the victims are women 537 and children. In the same vein, it can be argued that a feminist approach would be most appropriate.538 Notwithstanding this, it is suggested here that policy goals for men, women and children can be different. Even the geographical and cultural grounding of women differs.539 However, the restrictive approach to international law that feminism advocates for540 can be limiting in attaining security and protection for all ICC witnesses. Thus, policy-oriented jurisprudence provides a broader, flexible and adequate approach as a mapping process of inquiry that can analyse and formulate the policy goals for men, women (gender sensitive goals) 541and children (most vulnerable in court)542 as witnesses before the ICC. It pins its emphasis on the importance of understanding the process of making and evolving

535 McKay, F, (2008) Victim Participation in Proceedings before the International Criminal Court, http://www.wcl.american.edu/hrbrief/15/3mckay.pdf , last accessed on 25 October 2013.

536 Arsanjani, M & Reisman, M. (2005) The Law -in-Action of the International Criminal Court, 99 American Journal of International Law, p.385.

537 Demers, A. (2006) Women and War: A Bibliography of Recent Works, 34(1) International Journal of Legal Information, pp. 98 – 103; UN Doc. E/CN4?Sub2/1998/13/1998 Special Rapporteur on Contemporary Forms of Slavery, Final Report on Systematic Rape, Sexual Slavery and Slavery –like Practices during armed conflict.

538 Charlesworth, H. (2000) The Boundaries of International Law: A Feminist Analysis, p.1.

539 Charlesworth, H., *Op. Cit*, Third World Legal Studies, pp.15-16.

540 Bensouda, F, (2014) Gender Justice and the ICC: Progress and Reflections, 16(4) International Feminist Journal of Politics, p.541.

541 Oosterveld, V. (1999) The Making of a Gender- Sensitive International Criminal Court, 1 International Law Forum du Droit International, p.38.

542 Beresford, S. (2005) Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable? 3(3) Journal of International Criminal Justice, pp.723-732.

international legal rules and principles. The needs of the decision specialists and all who would understand and affect the community processes and goals. It is contextual, as it perceives all features of social process of immediate concern relating to events of a relevant decision. It is also problem-oriented and multi-methodological.543 All this demonstrates the unique characteristic that the approach has and its potential to serve and protect humanity. This is in line with new understanding of human security as a focus on individual or people and a serious challenge to both international law and international legal order.544 The multidisciplinary approach towards international law as opposed to a purely legal perspective approach enables an understanding and appreciation of different social and political environments through which international law operates. Further, it creates a widely accepted legal network or platform of interaction of not only states but international organizations as well. It is what can be described as "an interpenetration of multiple processes of authoritative decision of varying territorial compass" 545 meaning that it is an interpenetration of international and national norms of decision-making.546

In order to succeed with these claims on behalf of this perspective in different situations, the claimant must access the bases of power. This gives the claim some efficacy and realism. It is this skill in the mobilization of authority as a base of power and strategies employed that will bring about human good. Moreover, the outcomes of interaction between perspectives, values, strategies, and institutions reflect upon the production, conservation, distribution, and enjoyment or consumption of all values. Therefore, the relevance of the approach is vital here as it is not just rules that matter but other considerations such as policy as well. For instance, the ICC is made up of different organs that work are involved in the handling of witnesses. For these organs to competently achieve their goals, they need to coordinate and depend on each other. This will enable them effect their different protection strategies,

543 Quirem, *Op. Cit*, pp.7-9.

544 Oberleitner, G. (2005) Human Security: A challenge to International Law? 11(2) Global Governance: A Review of Multilateralism and International Organizations, p.185.

545 Suzuki, E, (1974) *Op. Cit*, p.30.

546 Wang, G. (2010) International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law, 18(1) Asia Pacific Law Review, pp.19–20.

achieve their anticipated outcomes within the ambit of the rule of law,547 namely, the Rome Statute. The strategies and bass of power enable decision-makers to decide which witnesses need what human values, in what circumstances such witnesses need relocation or review of their protective measures, what bases of values are essentially applicable to those witnesses, and finally what strategies can best resolve their challenges such witnesses have been subjected to.548 It is argued then that law only provides a means to clearly organize and record principles, rules, prior interpretations and results in order to attain approximate consistency, continuity, universal application, predictability, common sense and human good. At first blush, one might find a policy oriented approach somewhat overwhelming and intimidating because it is such a provocative and stimulative intervention in the study of international law. 549 Just like the view propounded by an English historian, Edward Thompson, it is argued that in decision-making the forms and rhetoric of law acquire a distinct identity that may on occasions inhibit power and afford some protection for the powerless.550 That protection for the powerless such as witnesses who are mostly vulnerable is the human good that the approach aims at achieving.

Policy oriented jurisprudence is not at all a conflation of politics into law. It is argued that there is a clear distinction between political processes and policymaking.551 What policy oriented jurisprudences advocates for is that the law should function as a structure of guiding rules and principles. This is legal process and not a political one. It also has strong political dimensions. Human good is the focus and a contemporary culmination of man's long struggle for all his basic human values.552 In order to determine an international policy in the face of conflicting demands and ideologies, there is need to take a close and neat observation

547 Chen, F,T, (2011) A Brief Clarification of the 'Rule of Law' in Policy Perspective, 34(1) Thomas Jefferson Law Review, p.113.

548 Kayuni, S, *Op. Cit,* UCL Law and Jurisprudence Journal, p.296

549 MacChesney, B. (1971) Myers McDougal, 1 Denver Journal of International Law and Policy, p.21.

550 Thompson, E. (1975) Whigs and Hunters, New York, Pantheon, p.266.

551 Wood, R.S. (1973-1974) Public Order and Political Integration in Contemporary International Theory: The Lasswell – McDougal Approach, 14 Virginia Journal of International Law, pp.423-429.

552 McDougal, M., Reisman, M & Leighton, K. (1949-1950) The Rights of Man in the World Community: Constitutional Illusions versus Rational Action, 59 Yale Law Journal, p.60.

at the generalities of international rhetoric and self-preserving declarations including the systematic way law has been related to social phenomena and basic values.553 It is argued therefore that applying the approach to the interpretation and application of the measures of witness protection, shifts the fulcrum from institutions to qualitative changes in peoples human good.554 In a nutshell, the approach is an omnibus inquiry that enables one to look at international legal process555 as a major instrument of change employing law purposively and realistically in order to serve the interests of a more just world and human good.

The contemporary approach to international law focuses on maximum protection of inter alia, people, environment and cultural life. 556 Practically, modern international lawyers 557 should endeavour to address urgent concerns of protection and security of people.558 All the criticisms of the policy-oriented approach fail to engage with the theory's internal and epistemic structure559 that clearly demonstrates that the approach does not detach knowledge from action. It is meant to make the scholar aware of her inquiry, integrated context approach560, assumptions and position that the decision-maker takes. This can only be achieved not by a single model of analysis but consideration of the policy-oriented analysis through diversity of political cultures, focusing on securing minimum and optimum order

553 Schachter, O. (1971) Myers McDougal – An Appreciation, 1 Denver Journal of International Law and Policy, pp.23-24.

554 Reisman, W, M (1990) Sovereignty and Human Rights in Contemporary International Law, 84 American Journal of International Law, pp.866-867.

555 Reisman, W (1981) International Law Making: A Process of Communication, 75 American Society of International Law Proceedings, p.113.

556Reisman, W.M (1995) Haiti and the Validity of International Action, 89 American Journal of International Law, pp. 82-83.

557 Snynder, H. & Lasswell, H. (1976) A Global Monitoring System: Appraising the Effects of Government on Human Dignity, 20 International studies Quarterly, p.221.

558 Corwin, W.J (1948) Book Review: Property, Wealth, Land: Allocation, Planning and Development by Myres McDougal; David Haber, 34 Virginia Law Review, p.632.

559 Saberi, *Op. Cit*, pp.88-89.

560 Lasswell, H., McDougal, M. (1943) Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale Law Journal, p.203.

within communities.561 This represents the overriding community goal562, which is the protection and security for witnesses. Witnesses as individuals are the ultimate target of the decision. However, the attainment of one goal depends on the attainment of other values as well.563 For instance, interdependence or multi-disciplinary approach by the theory is what makes it deliver. Despite its legal regime, the ICC's witness protection system depends on internal and external coordination of all actors. States parties need to coordinate with the OTP, VWU and the Defence regarding implementation of protective measures. Further, the ICC needs to mobilise enough resources needed for such implementation of protective measures such as psychological needs assessment. Therefore, such interdependence is what policy-oriented jurisprudence advocates for as contextualization of a problem.564

Decision-makers decide who may pursue which goal values, in what situations, with what base values and using what strategies to achieve anticipated outcomes.565 Decision makers will have to decide what base values would be applicable to witnesses at risk and what strategy would best solve their circumstances. It is thus concluded that various approaches do not reflect the accurate description of all realities of world power. Varying preferences about relative roles of national and international policies as regards witness protective measures and cooperation can be ably deduced from the policy-oriented approach. Strict adherence to normative and ambiguous focus on rule-oriented approach as opposed to processes of authoritative decision566 obtaining in different community contexts fail to offer adequate framework of inquiry. Even though principles and procedures cannot spell out their own

561 Reisman, W, M (1997) Designing and Managing the Future of the State, 8 European Journal of International Law, p.416.

562 McDougal, M. (1974) Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies, 14 Virginia Journal of International Law, p.406.

563 Reisman, W.M, *Op. Cit*, p.311.

564 Wiessner, S., *Op. Cit*, Asia Pacific Law Review, p.47; *see also* Chen, T. F (2011) A Brief Clarification of the 'Rule of Law' in Policy Perspective, 34(1) Thomas Jefferson Law Review, pp.113-114.

565 *Ibid.*

566 McDougal, M, & Reisman, M, (1980) The Prescribing Function in World Constitutive Process: How International Law is Made, 6 Yale Studies in World Public Order, p.250.

performance, procedures should be able to control performance.567 Effective performance of an organizational inquiry should comprise relevant intellectual tasks. There should be descriptions of past patterns that can enable a depiction of experiences and challenges as regards for instance witness protective measures. Such descriptions are incomplete without an accountability of factors that affect them. Projection of future patterns can help predict a future outlook of how witness protective measures are likely to be ordered or implemented. Further, consideration of alternative patterns will help decision-makers find practical solutions to the challenges facing witness protective measures at the ICC.

The bases of power or functions of power at the disposal of authorized decision makers prescribe and apply inclusive policies, performance of an intelligence function for guidance in making rational decisions, informal recommendation of policies for formal prescription, invocation of an appropriate community policy and power, the appraisal of such policies and termination of the policy. These form the basis for the legal framework establishing an institution. Further, such base can extend to the actual mandate that the said institution or office has. The PTC, TC, OTP and VWU all have their bases of power in the Rome Statute of ICC prescribing the mandate for each organ of the court. How then can this base of power be construed and understood for good of human kind? It is suggested that when considering the Rome Statute of the ICC's interpretation and applicability to the understanding of witness protection measures, the process that is taken to understand and map an inquiry into the common good of the world community. It is further suggested that policy-oriented approach can provide solutions to the proper understanding, interpretation and application of the appropriate measures for witness protection.

The contextual recognition that approach accords different expectations by varied communities is an advantage.568 It is suggested that considerations of each case on its own accord and merit enables the approach conform to the values of particular witness or

567 McDougal, *Op. Cit*, p.32.

568 Kayuni, S, *Op. Cit*, UCL Law and Jurisprudence Journal, p.297.

community needs. The knowledge contribution and analysis facilitates better legal interpretation and implementation of the protective measures. It thus converges Rome statute, political pressures of states parties, intra-organ coordination and international cooperation so as to ameliorate ICC witness circumstances.

2.5 CONCLUSION

Policy-oriented jurisprudence has a global problem solution potential as it encompasses several major, empowering, fertile and innovative features in its analytical framework. It combines an understanding of power and decision-making in relation to the law.[569] This combination distinguishes it from several other approaches to the study of international law such as positivism, feminism, critical legal studies and law and economics. Further, the use of knowledge from all relevant disciplines, not just law, to solve a problem, identify conflicting claimants and their perspectives, predicting decisions on the basis of altering factors and developing solutions to problems[570] makes its approach broader than what traditional schools of jurisprudence encompass. It is not only a theory about law but also a means of describing social process and the role of law within it. It is also a means of describing techniques for systematic research into legal problems and a framework for analysis of theories about law.

This chapter has outlined the theoretical framework of this study and its applicability to protective measures of witnesses under the Rome Statute of the ICC. It firstly analysed what policy-oriented approach is all about. The approach views international law as an authoritative decision making process571 that aims at achieving public order with respect for human dignity.572 This is done by an analytical method whereby a decision maker or

569 Mautner, M. (2009) Michael Reisman's Jurisprudence of Suspicion, 34 Yale Journal of International Law, p. 506.

570 Wiessner, *Op. Cit*, p.41.

571Sloane, R. (2009) More Than What Courts Do: Jurisprudence, Decision, and Dignity – In Brief Encounters and Global Affairs, 34 Yale Journal of International Law, pp.517-519.

572 McDougal, M. (1959) Perspectives of an International Law of Human Dignity, 53 Proceedings of the American Society of International Law, p.107.

participant clarifies and implements common interests in accordance with community expectations focusing on realities of rules and politics.573 In the same vein, it discusses five intellectual tasks that facilitate the perspectives of decision-making process namely: goal formulation, trend description, factor analysis, projection of future decisions and invention of alternatives. 574 The approach lists eight goals that human beings cherish as values or expectations for a community towards achieving human dignity. These goals are power, well-being, enlightenment, skill, affection, rectitude, health and respect. In order to attain these goals, there is a prescribed functional analysis or mapping process with seven functions. These functions are: intelligence, promotion or recommendation, prescription, invocation, application, termination and appraisal. Secondly, the chapter has discussed the main critiques of the approach. Positivism leads the attack with its adherents describing it as concentrating more on the political aspects of international law.575 It further has too wide, general576 and confusing 577 scientific method that completely neglects the law 578 and is difficult to apply.579 Another critique extends from feminist approaches to international law. Women are usually the ones that suffer most during war580, yet they are the most neglected in international law. It is therefore imperative that they are seriously considered in a balanced and non-stereo typed image.581 Feminists have criticized the approach as being narrow and failing to factor in the decision maker's gender and the gendered world of international law that undervalues women.582 Law and economics adherents have attacked the approach as

573 McDougal, M., *Op. Cit*, p.2.

574 Reisman, *Op. Cit*, p.576.

575 Mullerson, R.A, *Op. Cit*, p.33.

576 Guillaume, G., *Op. Cit*, pp.281-283.

577 Osofsky, H., *Op. Cit*, p.603.

578 Simma, B. & Paulus, A., *Op. Cit*, pp.302-316.

579 Osofsky, *Op. Cit*, p.603.

580 Niarchos, C.N, (1995) Women, War and Rape: Challenges Facing the International Criminal Tribunal for Yugoslavia, 17(4) Human Rights Quarterly, pp.649 -690.

581 SaCouto, *Op. Cit*, pp.297-334.

582 Mouthaan, S., *Op. Cit*, p.649.

asking too many questions without providing satisfactory answers.583 Further, it analytical techniques have several limitations. Critical Legal Studies theorists have criticized the approach as having general goals or values that are synonymous with the western, liberal and constitutional values.584 These western values cannot competently address the challenges that the law faces.

Thirdly, the chapter argues for a policy oriented approach and its rationale as an effective method which is needed by the ICC's witness protective measures. ICL within which the ICC operates is most usefully conceived not as a pre-existing body of rules 585, but as a comprehensive process of authoritative decision in which rules are continuously being made and remade. The function of the rules is to communicate the perspectives of the world community, namely demands, identifications and expectations. The rational application of these rules in particular instances requires their interpretation in terms of who is using them, with respect to whom, for what purposes (major or minor) and in what context. Even its fierce critics agree that its focus on the values has a considerable impact on the policy proposals formulation. 586 Its insights and analytical tools have a life of their own 587 providing an understanding and elaboration of the salient features of decision-making process. 588 Thus, the multiple methods the approach seeks to develop through the mapping process gives the approach a special feature. Social process 589, power process 590 and

583 Dunoff, J. & Trachtman, J., *Op. Cit*, pp.28-36.

584 Trimble, P., *Op. Cit*, p.814.

585 Cryer, R. (2006) International Criminal Law vs. State Sovereignty: Another Round? 16 (5) European Journal of International Law, pp.990–1000.

586 Simma, P., *Op. Cit*., p.28.

587Moor, J.N (1968) Prolegomenon to the Jurisprudence of Myers McDougal and Harold Lasswell, 54(4) Virginia Law Review, pp.664-665.

588 Shin, Hi-Taek (2010) The Transnational Investment Process from the Prospective of the New Haven School of Jurisprudence, 18(1) Asia Pacific Law Review, pp.81-83.

589 The activity of human beings through their institutions to promote their values.

590 Specialized aspect of social process whereby it is the activity of human beings pursuing power through institutions.

constitutive process[591] create reasonably predictable expectations about the allocation of fundamental decision-making authority.[592] Therefore, the functional analysis of constitutive process brings about an emergence of authority and normative integration[593] where policy and rules converge into one. Accordingly, the markers used to map the social process firstly identify participants as having a critical role to play in the decision making process. Among these participants are governmental groups[594], non-governmental groups that includes political parties, pressure groups and private associations and finally individuals. These are individual actors that emerge with subjectivities or perceptions. Notwithstanding different expectations of human good, each situational context will influence the efficacy and realism of the claims of perspective.[595] What matters most is whether such claims of perspectives in different situations are solving the problem at hand.[596] This is where the approach claims respect as it focuses on the amelioration of human good.[597] The approach is still a very influential methodology, still very applicable in the contemporary world affairs and it would be wrong to describe it as once in the limelight and now in the distant memory.[598] The foregoing discussion will demonstrate how the past trends or history as regards decision-making for witness protective measures. It will be demonstrated how common and civil law jurisdictions, and international criminal tribunals have demonstrated attempts to attain security and protection values for witnesses are at risk due to account of their testimony.

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591 An aspect of the power process whereby institutions for the management of power are effectively and authoritatively developed.

592Nagan, W., & Haddad, A. (2011-2012) Sovereignty in Theory and Practice, 13 San Diego International Law Journal, p.508.

593 *Ibid*, p. 509.

594 National and transnational.

595 Boczek, B.A. (2005) International Law: A Dictionary, Oxford, Scarecrow Press, pp.22-23.

596Norchi, C.H (2010) Fixing a Fractured State: a Jurisprudence for a Free Society, 8(1) Asia Pacific Law Review, pp.11–13.

597Reisman, M. & Schreiber, A. (1987) Jurisprudence: Understanding and Shaping Law, New Haven, New Haven Press, p.11.

598 Graham, L (1995) Law Schools Without Lawyers: Winds of Change in Legal Education, 81 Virginia Law Review, p.1429.

The relevance of policy oriented jurisprudence as discussed in this Chapter, has a huge bearing on the rest of the thesis. As discussed above, policy oriented jurisprudence offers an opportunity for those engaged in the decision-making process for the ICC's witness protection system. Such decision-makers can efficiently identify trends, content and challenges of the protective measures, analyse them and identify possible solutions and ways of implementing such solutions. Therefore, pursuant to this approach, the proceeding chapters discuss past trends in decision-making for national witness protection programs and internationalized tribunals. Further, there is an analysis of the current trends and practices of ICC's witness protection system. Law as a process of decision-making is not complete until effective recommendations are made to towards alternative solutions to the community's challenges.599 Therefore, based on this approach, the thesis will make recommendations as possible solutions to the ICC's witness protection problem.

599 McDougal, M,S. *Op. Cit*, 1 Natural Law Forum, p.53.

CHAPTER THREE

WITNESS PROTECTION

3.1 INTRODUCTION

Witnesses have always played a crucial role in the investigation, prosecution and adjudication of serious crimes. 600 Procedural and non-procedural protective measures ensure that essential evidence is made freely available to the Court and without intimidation. 601 Competent decision-making by prosecution, judges and defence lawyers can secure the crucial procedural and non-procedural protective measures that witnesses need. Adherents of policy oriented jurisprudence have argued that an understanding of past legal responses602 to societal problems helps in finding solutions. 603 Therefore, this chapter discusses the background, legal framework and practice604 of witness protection. It firstly looks at the origins, practice and challenges in common law jurisdictions. Secondly, it analyses similar practices and challenges in civil law jurisdictions. Thirdly, it considers protective measures and challenges within international criminal tribunals, namely, (a) the second generation605 criminal tribunals of: (i) the International Criminal Tribunal for Yugoslavia (ICTY), (ii) the International Criminal Tribunal for Rwanda (ICTR); (b) the third generation criminal tribunals of: (i) the Special Court for Sierra Leone (SCSL), (ii) the Special Panels For Serious Crimes (SPSC) in East Timor, (iii) the Extraordinary Chambers in the Courts of Cambodia (ECCC) and (iv) the Special Tribunal for Lebanon (STL). In order to avoid repetition, this chapter discusses the debate on balancing the rights of an accused person and the interests of

600 Eniko, F., (2006) Rising Importance on the Protection of Witnesses in the European Union, 77 Revue Internationale De Droit Penal, pp.313-314.

601 *See generally*, Glucic, S., *et. al*, (2006) Protecting Witnesses of Serious Crimes-Training Manual for Law Enforcement and Judiciary, Strasburg, Council of Europe Publishing.

602 Policy oriented jurisprudence terms them 'past trends'.

603 Wiessner, S, *Op. Cit*, Asia Pacific Law Review, p.48.

604 Common and civil law jurisdictions, and international criminal tribunals. These form the genesis of witness protection mechanisms.

605 First generation were Nuremburg and Tokyo Tribunals after WWII. Such a generation never had considerations for witness protective measures. It is only the second generation international criminal tribunals that started considering witness protective measures for vulnerable witnesses.

witnesses as regards achieving justice only partially.[606] This is so because there is a considerable amount of existing literature on this debate.[607] Lastly, the chapter sums up the discussion on witness protection and its practice by arguing that the protective measures being considered, have had a similar pattern that disregards any decision-making process that guarantees protection for vulnerable witnesses.

3.2 COMMON LAW JURISDICTIONS

Where common law requires a person to testify when needed,[608] the success of criminal prosecution relies on the paramount[609] role that witnesses play in investigations and fear-free testimony in court.[610] Witness protective measures can be traced back to policy of the 1970s US Federal Government.[611] Many prosecutions of organised crimes had to be suspended due to murder of the witness[612] or reprisal fears[613] prior to their court

606 See discussion on this in Chapter 1. The ambit of the Thesis is not necessarily on that part of witness protective measures as so much has already been written on it but the non-procedural protective measures.

607 Leigh, M, (1997) Witness anonymity is inconsistent with due process, 91(1) The American Journal of International Law , pp.80-83; Creta, V, M. (1997) The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 20 Houston Journal of International Law, pp. 381; Wald, P,M. (2002) Dealing with witnesses in war crime trials: Lessons from the Yugoslav Tribunal, 5 Yale Human Rights and Development Law Journal, p.217; Beltz, A, (2008) Prosecuting rape in international criminal tribunals: the need to balance victim's rights with the due process rights of the accused, 23. John's Journal of Legal Comment, p.167; Lusty, D, (2002) Anonymous Accusers: An Historical & (and) Comparative Analysis of Secret Witnesses in Criminal Trials, 24 Sydney Law Review, p.361; Zappalà, S, (2010) The Rights of Victims v. the Rights of the Accused, 8(1) Journal of International Criminal Justice, pp.137-164; Hoyano, L, (2001) Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial? 1 Criminal Law Review, pp. 948-969; Pozen, J, (2005) Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials, 38 New York University Journal of International Law and Politics, p.281; Goldschneider, A, (2004) Choose Your Poison: A Comparative Constitutional Analysis of Criminal Trial Closure v. Witness Disguise in the Context of Protecting Endangered Witnesses at Trial, 15 Georgia Mason University of Civil Rights Law Journal, p.25.

608 Levin, J.M,(1985) Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in Witness Protection Program,76(1) Journal of Criminal Law and Criminology, p.208.

609 Fyfe, N.R. *et.al*.,(2000) Desperately Seeking Safety: Witnesses Experiences of Intimidation, Protection and Relocation, 40British Journal of Criminology,p.675.

610 Maynard, W.,(1994) Witness Intimidation, Strategies for Prevention, Police Research Group, Crime and Prevention Series: Paper No.55, London, Home Office (Police Department), p.4.

611 Slate, N.R.(1997) The Federal Witness Protection Program: Its Evolution and Continues Growing Pains, 16(2) Criminal Justice Ethics,p.20.

612 *US–v-Mastrangelo* 662, F.2d. 946, 949 (2nd Circuit 1981), 456US 973 (1982).

testimony.614 At that time, the US government was facing serious organised crime groups, mainly from the immigrant Italians.615 Authorities referred to them variedly as 'The family', 'Mafia', 'La Casa Nostra', 'the Mob' or 'the Syndicate.'616 According to the Director of Federal Bureau of Investigations, J. Edgar Hoover, around 1969, there were over twenty groups operating as criminal cartels in major metropolitan areas.617 As opposed to the Italian magistrates under their Codice Rocco of the period,618 the US Federal Government had no draconian powers to enable effective enforcement.619 Disjointed and sometimes *ad hoc* state sponsored witness protection programs existed in some parts of the country. This led to an establishment of a formal Witness Protection Program (WPP)620 now known as Witness Security Program (WITSEC)621 authorizing the Federal government to provide witnesses protection for temporary or permanent purposes. 622 In support of Finn and Healey's argument, it is suggested here that such an establishement was recognition that witness intimidation or harm had a profound and serious impacy on the ability of law enfocement agencies to enforce laws and society's confidence in government's ability to protect its

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613*United States–v-Gravel*, 605F.2d 750, (5thCircuit,1979).

614 Demleitner, N.V, (1998) Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options? 46 American Journal of Comparative Law Supplement, p.644.

615 Wilson, W, (1970) Threat of organized crime: Highlighting the challenging new frontiers in criminal law, 46 Notre Dame Law, p.41.

616 US Govt (1967) The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, https://www.ncjrs.gov/pdffiles1/nij/42.pdf , last accessed on 04 February 2016.

617 Such as New York, New Jersey, Florida, Lousiana, Nevada, Illinois, Pennsylvania, California, Rhode Island, Michigan, Ohio, Missouri and Massachusetts, see US Govt, (1969) Organized Crime Control Act of 1969, Report of the Committee on Judiciary United States Senate Together with Individual and Additional Views to Accompany s. 30, Senate Report No. 91-617, 91st Congress, 1st Session, pp. 36-43, https://bulk.resource.org/gao.gov/91-452/00004DB8.pdf, last accessed on 4 February 2016.

618 Volcansek, M, L, (1990) Decision-making Italian style: The new code of criminal procedure, 13(4) West European Politics, pp. 33-45; *see also* Freccero, S, P, (1993) An Introduction to the New Italian Criminal Procedure, 21 American Journal of Criminal Law, p.345.

619 US Govt, (1967) The Challenge of Crime in a Free Society: Report by the President's Commission on Law Enforcement and Administration of Justice, pp. 186-209, https://www.ncjrs.gov/pdffiles1/nij/42.pdf, last accessed on 03 February 2016.

620 Levin, *Op. Cit*, p.209.

621 US Marshal Service (2015) The Witness Protection Program, http://www.usmarshals.gov/witsec/, last accessed on 15 February 2014.

622 Levin ,*Op. Cit*,p.210.

citizens.623 By depriving crime investigators and prosecutors of critical evidence, witness intimidation undermines the criminal justice system's ability to protect its citizens and ultimately undermines the confidence citizens have in their government. 624 Opponents described it as complex, non-implementable and not beneficial to the public625 as it seriously affected due process of the law, protected criminals and was excessively expensive. Nevertheless, authorised under the Organized Crime Control Act of 1970 and amended by the Comprehensive Crime Control Act of 1984,626 WITSEC became the most important and valuable tool for fighting organized crime and major criminal activity627 preventing witness interference628 and deaths.629

1. The US Witness Protection Program (WPP)

WITSEC supported the dignity of witnesses630 by protecting those with important testimony and whose lives were in jeopardy.631 It is suggested that in the provision of such dignity to witnesses, necessary confidence had to be created in the minds of the witnesses that they would be protected from the accused in any eventuality. Legislative measures had to be established to ensure that certain procedural safeguards would be followed to protect witnesses. Such protection had become the imminent and inevitable basis for successful trials. This section will attempt an analysis of the operation of WITSEC. Under this program,

623 Finn, & Healey. (1996). Preventing Gang- and Drug-Related Witness Intimidation, Washington DC, U.S. Dep't of Justice, 1.

624 *Ibid*

625 Krasno, M.R.,(1982-1983) The Victim and Witness Protection Act of 1982–Does It Promise More Than The System Can Deliver?, 66 Judicature, p.469.

626 US Marshal Service, (2015) Witness Security, http://www.usmarshals.gov/duties/factsheets/witsec.pdf, last accessed on 4 February 2016.

627Slate, *Op. Cit*, p.20.

628 Riley, T.M,(1999) Tampering with Witness Tampering: Resolving the Quandary Surrounding 18U.S.C Sections 1503& 1512, 77 Washington University Law Quarterly,pp.270-271.

629 Goldstock, R.& Coenen, D.T(1980) Controlling the Contemporary Loansharks: Law of Illicit Lending and the Problem of Witness Fear, 65(2) Cornell Law Review, pp.206-208.

630 Health safety and welfare.

631 Mass, S.,(1982) The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among Fear of Reprisals, the Contempt Powers of the Court and the Witness Protection Program, 50(4) Fordham Law Review, pp.585-586.

witnesses voluntarily relinquish fundamental rights and personal autonomy.632 The Marshall Service is entrusted with responsibility for the day-to-day633 provision of security, health and safety for government witnesses and their immediate dependents whose lives are in danger because of their testimony.634 As rightly observed by the Court in *Franz -v- United States*,635 originally, the program was formulated to purchase and maintain housing facilities for protected witnesses. Non-procedural protective measures within the WITSEC program included the physical protection, documents for a new identity, housing, transportation, subsistence for living, assistance in obtaining employment, and other services needed to make the individual self-sustaining. In return, the identity and location of the individual would not be disclosed, unless law enforcement officials indicate the individual is under a criminal felony investigation. 636 Accordingly, the court in *Garcia -v- United States* 637 has recognised that the legislative intent for the protective measures was twofold, namely; the creation of an incentive for persons involved in organized crimes to become informants and recognition of the moral obligation to repay citizens who risked life by carrying out their duty as citizens to testify.638

The Marshall Service as decision-maker, restricted personal affairs, freedom of association, 639movement, relocation, identity and liberty. 640 Clearly there is a need to establish a balance between protected witnesses' rights and those of the community, in order to preserve

632 Anderson, J.R &Woodard, P.L,(1984–1985) Victims ad Witness Assistance: New State Laws and the System's Response, 68(6)Judicature, pp.234-243.

633 Authorized under the *Organized Crime Control Act of 1970* and amended by the *Comprehensive Crime Control Act of 1984*, the Justice Department has two agencies: The Marshall Service responsible for housing documentation and employment of witnesses, and the Office of Enforcement Operatives responsible for eligibility and coordinating court appearances.

634 US Marshal Service, Witness Protection Program, http://www.usmarshals.gov/witsec/ last accessed on 18 April 2014.

635 *Franz v. United States*, 707 F.2d 582, 586-87 (D.C. Cir. 1983).

636 *Ibid*

637 *Garcia v. United States*, 666 F.2d 960, 963 (5th Cir. 1982).

638 *Ibid*

639 Relatives and friends.

640 Mass, *Op. Cit*, p.587.

community order.641 This was also confirmed in the case of *Bergmann–v-United States*, where a witness who had not been properly assessed as to his risks to the community but admitted into the WPP, killed a police officer while committing a burglary. Thus, there is need for a mandatory risk assessment of such witnesses to the community before they are allowed on the program.642 Therefore, all potential witnesses have to undergo intensive vetting by the sponsoring law enforcement agency such as the US Attorney sponsoring potential witnesses.643 The US Marshal Service conducts a preliminary interview and the Department of Justice's Office of Enforcement operations authorizes the inclusion of witnesses.644 Protective measures standards specific to the WITSEC are based on: the witness' value to the trial including a record of the witness' background, testimony significance, testimony summary, other prospective witnesses, degree of witness threat,645 persons connected to the witness, relocation recommendations, witness assets and liabilities, witness and family views on relocation and cooperation,646 estimated court appearance date, other witnesses granted protection, witness and family medical problems, parole restrictions and monetary needs.647 The focus of logistical arrangements is the provision for security, safety and health of government witnesses and their authorised family members, whose lives are in danger because of their cooperation with the US government.648 Further, the WITSEC offers 24 - hour protection to all witnesses while they are in a high threat environment or danger. New identity documents are granted to family members. Financial assistance is also

641 Levin, *Op. Cit*, p.212.

642*Bergmann–v-United States* 526 F.Supp.443, September 16th, 1981, https://casetext.com/case/bergmann-v-united-states-3 , last accessed on 04 February 2016, while committing a burglary, WPP witness killed a police officer.

643 US Marshal Service, (2015) Witness Security, http://www.usmarshals.gov/duties/factsheets/witsec.pdf , last accessed on 4 February 2016.

644 *Ibid.*

645Pesce, T.A.,(1986) Defining Witness Tampering Under 18U.S.C, Section 1512, 18 Columbia Law Review, p.1417.

646 Hart, P.E.,(2009) Falling Through the Cracks: The Shortcomings of Victim and Witness Protection Under Section 1512 of the Federal Victim and Witness Protection Act, 43 Valparaiso University Law Review, p.775.

647 Levin, *Op. Cit*, p.215.

648 US Marshal Service, (2015) Witness Security, http://www.usmarshals.gov/duties/factsheets/witsec.pdf, last accessed on 4 February 2016.

available for housing, subsistence for basic living expenses and medical care, job training and employment. Considering that the WITSEC is a vital and effective tool for the fight against organized crime, drug trafficking, terrorism and other major criminal enterprises, it relies heavily on the full cooperation of local enforcement and court authorities.649 It has been held in *United States -v- Watson*650 that all information about witnesses in the WITSEC program is confidential and not subject to disclosure.651 It is observed here that this raises the question of whether defence counsel is prevented from inquiring into the protected witness's true name, new identity, or current address when the witness testifies at trial. As decided in the *Watson Case*, witnesses in the WITSEC program and testifying can be allowed to proceed without revealing their new identity if they demonstrate to court that there is sufficient danger.652 To this effect, the *case of Tarantino*653 has held that the defence has restricted questions on cross-examination about the protection program. Questions about payments and other government support have been allowed, but information about the protection itself has not.654 Commenting on restricted cross-examination, the Supreme Court in the *case* of *Alford -v- United States,*655 had earlier observed that prejudice ensued from a denial of the opportunity to place the witness in his proper setting, and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise him. It is suggested here that the right to effective cross-examination, therefore, encompasses access to material that could serve as a basis for such questioning, including a witness's address. That notwithstanding, restricted cross-examination would still be pertinent when balanced with other factors656 such as the danger in which the witness is. Therefore, as decided in the *United States v. Palermo*, the defendant has no absolute right to discover the names and

649 *Ibid.*

650 *United States v. Watson*, 599 F.2d 1149, 1157 (2d Cir. 1979).

651 *Ibid*

652 *Ibid*

653 *United States v. Tarantino*, 846 F.2d 1384, 1407 (D.C. Cir. 1988).

654 *Ibid*

655 *Alford v. United States*, 282 U.S. 687 (1931).

656 *United States v. Cosby*, 500 F.2d 405, 407 (9th Cir. 1974).

addresses of witnesses if a threat to their personal safety existed. 657 It is immaterial whether such a threat to the witness's safety emanated from the defendant or from unknown third parties.658 For instance, a witness who was a Drug Enforcement Agency informant had threats against his life made in the city where he lived, and he still had cases pending in which he would give information.659 Challenges within WITSEC have included allegations of a lack of proper structure to address problems related to its participants such as child custody arrangements, harm to third innocent parties and debt collection issues.660 Further, increased cross-border criminality, expansion of internet use and financial burden have certainly affected the implementation of witness protective measures.661 Faced with ever-increasing levels and varieties of criminality on national and international levels,662 witness protection has been undermined by the lack of proper coordination or information sharing among law enforcement agencies as regards new identities of WITSEC participants.663 This has led to failure to keep track of special participants such as suspected terrorists.664 Other challenges have been low staffing levels, delayed admissions into WITSEC due to pro-longed interviews of participants, challenges in witness suitability for the program, lack of training in employment counselling for WITSEC local inspectors leading to improper job-hunting

657 *United States v. Palermo* 410 F.2d 468 (7th Cir. 1969).

658 *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1991),

659 *Clark v. Lewis*, 506 U.S. 838 (1993).

660 Lawson, R, J. (1992) Lying, Cheating and Stealing at Government Expense: Striking a Balance between the Public Interest and the Interests of the Public in the Witness Protection Program, 24 Arizona State Law Journal, p.1429.

661 Mack, R.L, (2014) The Federal Witness Protection Program Revisited and Compared: Reshaping an Old Weapon to Meet New Challenges in Global Crime Fighting Effort, 21 University of Miami International Law and Comparative Law Review, pp.192-196.

662 *Ibid.*

663 In a 2013 Department of Justice Summary Report, it was stated that there existed national security vulnerabilities. These were addressed in a summary fashion " due to the statutory restrictions and concerns about national security and the safety of Program participants....". " when handling known or suspected terrorists in the WITSEC Program, national Security risks must be mitigated by specific formalized procedures that consider national security implications along with the protection of WITSEC participants. We found significant deficiencies in the handling of known or suspected terrorists who were admitted into the WITSEC Program." See U.S. Dept. of Justice, Office of the Inspector General, Audit Division, Rep. 13-23, 1 (2013) Interim Report on the Department of Justice's Handling of Known or Suspected Terrorists Admitted into the Federal Witness Security Program, Public Summary, p.1, http://judiciary.house.gov/_files/news/2013/13-23%20Public%20Summary.pdf last accessed on 05 February 2016.

664 *Ibid.*

advice and prolonged reliance on subsistence funding.665 According the Federal Bureau of Prisons' Witness Security Program Report, poor record keeping for incarcerated WITSEC participants has resulted in some protected inmates being placed in the same facilities as other prisoners with the potential of being harmed.666 It is suggested from the foregoing that WITSEC has had a defective decision-making process that centred mainly on the Marshall Service with little regard for the witnesses themselves, public, the defence and the Court. This has led to a lack of coordination among law enforcement agencies, little or no linkage of new identities to previous ones given to protected witnesses and their families, erratic assistance to witnesses and monitoring, excessive expenditures and inconsistent witness selection policies leading to sometimes over-admission.667 These challenges within the WITSEC have resulted in the development of innovative measures such as the broadening of the range of protected persons to include families.668 There have also been consideration for temporary safe houses as opposed to permanent relocation with less agent-witness contact. Further to this, there has been constant review of the law to accommodate contemporary changes such as digital advancements, counselling and the use of psychology experts669, a

665 Mack, R.L, *Op. Cit*, University of Miami International Law and Comparative Law Review, pp.203-205.

666 US Dept. of Justice, Office of the Inspector General Audit Division (2008) The Federal Bureau of Prisons' Witness Security Program (Redacted Public Version), Audit Report 09-01, October, 2008 https://oig.justice.gov/reports/BOP/a0901/final.pdf , last accessed on 05 February 2016.

667 One Case within 30 hours there was use of 13 Marshall officers , armoured vehicles, bullet proof trucks, smoke canisters, 5 trucks of electronic alarms in safe houses, Gao Report, http://www.gao.gov/products/GGD-83-25 , last accessed on 18 April, 2014; *see also* Gao Report, (1983) Changes Needed in the Witness Security Program, Report of the Comptroller General of the United States, pp. 7- 8, http://www.gao.gov/products/GGD-83-25 last accessed on 18 April 2014. In a Report to Congress Subcommittee, government accountability office reported that WPP in 1982 was designed to adopt no more than 50 witnesses per year but in practice it had accepted 4000 witnesses and over 8000 family members with a staggering USD 28 million annual cost; Between 1991 and July 1994, 79 witnesses and 150 family members had received its services at an average cost of $20,000 for a family of 4 leading to a conviction of over 100 people, Schur, G., (1994) Statement before the Senate Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, House of Representatives, 103 Congress (2nd Session), 4 August, 1994, Washington: US Government Printing Office, pp. 24 – 37; As of 2010, 16, 000 witnesses and their families were into the WITSEC with more than USD 25 million and 10 new participants admitted every month, Albanese, J.S, (2010) Organized Crime in Our Times, New York, Mathew Blender & Company, pp. 286 – 288; Lawson, R.J., (1992) *Op. Cit*, Arizona State Law Journal, pp.1430-1431.

668 McLaughling, J.,& Joshua, M.,(2007) Obstruction of Justice, 44American Criminal Law Review,p.812.

669Koedam, W.S.,(1993) Clinical Considerations in Treating Participants in the Federal Witness Protection Program, 21(4)The American Journal of Family Therapy,pp.361-368.

witness signing memorandum with rights and duties to the outside world670, unique contact code with agent and withdrawal for those that do not comply.671 Accordingly, since 1971, statistics shows that the US Marshall Services has protected around 18, 400 participants from intimidation and retribution.672 This figure includes innocent victim-witnesses, cooperating defendants, and their dependent family members. Further, by the 19th February 2015, it had provided witness security services to approximately 8,500 witnesses.673 For the same period, it had further provided security services to family members of government witnesses for approximately 9,900 people. 674 Other support include prisoners' security and judicial security for US Attorneys, Assistant Attorneys and Judicial branch staff.675

2. Exporting the Witness Protection Program to other major common law jurisdictions

Anglo-American cultural representations have penetrated all global areas due to their dominion of mass communications.676 Thus, WITSEC became the paradigm programme677 introduced later in several common678 and civil679 law jurisdictions. In the United Kingdom

670 No contacts with old friends or relatives, drugs; Mass, *Op. Cit*, p.216.

671 *Ibid*, pp.362-364

672 US Marshal Service (2015) Witness Security, http://www.usmarshals.gov/duties/factsheets/witsec.pdf last accessed on 4 February 2016.

673 US Marshal Services (2015) Facts and Figures for 2015, http://www.usmarshals.gov/duties/factsheets/facts.pdf

last accessed on 04 February 2016.

674 *Ibid.*

675 *Ibid.*

676 Hatchard, J., *et al*, (1996) Comparative Criminal Procedure: An Overview in Hatchard, J., *et. al.*,(Eds.) Comparative Criminal Procedure, p.1.

677 See generally Robert-Smith, L.,(2000) Review of the Western Australia Police Witness Protection Program, Volume 1, Perth, Government of Western Australia.

678 Australia, Canada, Kenya, South Africa, Ireland, Jamaica, New Zealand, Philippines, Hong Kong China and many other commonwealth countries. It is not possible within the thesis to comprehensively discuss all the commonwealth states with WPP. Substantive discussion is restricted to US and United Kingdom only. The US demonstrates its long experience and history while the UK has a long tradition or root of criminal justice/ common law that has spread to other common wealth countries. All these copy from US WPP practice.

679 see section 3.3.

as early as the year 1913, the House of Lords was already grappling with the administration of justice in as far as witnesses and public trials are concerned. It was held in *Scott -v- Scott*680 that the exception to the general rule that the administration of justice should take place in open court should be based upon the operation of some other overriding principle which does not leave its limits to the individual discretion of the judge. As such, it was open to the Court in the exercise of its discretion to control the conduct of proceedings so long as the court reasonably believes it to be necessary in order to serve the ends of justice.681 In the case of *R-v- DJX, SCY, GCZ*682, the Court of Appeal allowed child witnesses to be screened from the accused person. Further to this, in the case of *R-v- Tailor (Gary),*683 various guidelines towards the conduct of witnesses during testimony were issued. It has to be noted that *ad hoc* protection programmes largely modelled on WITSEC were established by the the Metropolitan Police684 and the Royal Royal Ulster Constabulary685 in 1978, while other police forces followed in the 1990s.686 This was established in order to relocate witnesses with crucial evidence involving serious and organised crime but facing danger from the accused and their associates. 687 This included terrorism related cases in Northern Ireland.688 Police forces acted on the witness security and safety based on the discretion of individual chief police officers as gatekeepers regarding admission into WPP with supervising officers adopting strategic roles on admission, relocation, housing and social

680 *Scott -v- Scott* [1913] AC 417

681 *Attorney General -v- Leveller Magazine Ltd* [1979] AC 440

682 *R-v- DJX, SCY, GCZ* (1991) Criminal Appeal Report 36

683 *R-v- Tailor (Gary)* [1995] Crimnal Law Review 253 (CA)

684 Greig, I., (1994) The Growing Menace of Witness Intimidation: Terrorist Intimidation and threats to witnesses, 4(4) Journal of International Security, pp.153-158.

685 Fyfe, N., & Mckay, H., *Op. Cit*, p.79.

686 In the 1990s, Greater Manchester Police, Hampshire Constabulary, Merseyside Police, Northumbria Police, West Yorkshire Constabulary and Strathclyde Police, Fyfe, N., & Mckay., *Op. Cit*, p. 284.

687 Fyfe, N.,& McKay, H.(2000) Police Protection of Intimidated Witnesses: A Study of the Strathclyde Police Witness Protection Programme, 10(3)Policing and Society: An International Journal of Research and Policy,pp.280 -283.

688 Hillyard, P, & Percy-Smith, J, (1984) Converting Terrorists: The Use of Supergrasses in Norther Ireland, 11(3) Journal of Law and Society, p.335; Richard, M, (2013) The Recent Supergrass Controversy: Have We Learnt from the Troubled Past?, 4 Criminal Law Review, p.273.

welfare.689 The Diplock Commission, appointed to consider various issues concerning the violent confrontations in the Northern Ireland suggested that witnesses could be screened from the accused.690 It has also been held that the identity of the witnesses should be kept a secret not only from the accused but also from the defence lawyer.691 Where there exists a serious possibility of a risk of harm to the witnesses and their families, courts have granted protective measures to the witnesses.692 Further, such protective measures can be extended to shifting the venue for trials and involving video-link technology in the event that there exists possible threats to those giving testimony in the trials. 693 In *Re Officer L (Respondent) (Northern Ireland),* witness admission comprised real and objectively verified 694 threat assessment put forward by divisional detectives. Witnesses signed memoranda of understanding that confirmed cooperation and set out the police assistance expected.695 Thus, WPP was a police function with policy and decision-making on financial costs greatly influenced by witness family responsibilities 696, length of time spent in temporary relocation, witness standard of living and the changing nature of the threats. Frequency of agent-witness contact was greatly reduced during the post-trial period as witnesses became self-reliant in new communities. 697 These *ad hoc* measures could on average cost from £10,000 to £50,000 in some programmes for the protection of a witness and family while in in other cases it varied to as low as £4,000 per year. 698 Further,

689 *Ibid*, pp.283-284.

690 Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, December 1972, London, Controller of Her Majesty's Stationary Office, http://cain.ulst.ac.uk/hmso/diplock.htm, last accessed on 1st May, 2017.

691 *R-v- Murphy* [1990] NI 306

692 *R-v- Lord Saville of Newigate* [1999] 4 All ER 860

693 *Saville -v- Widgery Soldiers* [2002] 1 WLR 1249

694 *In re Officer L(Respondent)(Northern Ireland)* [2007]UKHL,36.

695 Fyfe, N. & McKay, H., *Op. Cit*, pp.285-286.

696 Whether to include them or not.

697 Fyfe, N.,& Sheptycki, J.,(2006) International Trends in the Facilitation of Witness Co-operation in Organised Crime Cases, 3(3) European Journal of Criminology, p.331.

698 Fyfe, N., & Sheptychi, J., (2005) Facilitating Witness Co-operation in Organised Crime Cases: An International Review, Home Office Online Report 27/05, p. 27, http://tna.europarchive.org/20100413151441/http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr2705.pdf last accessed on 18 April 2014.

relocation as a measure left witnesses apprehensive. For instance in a Strathclyde study, interviews with witnesses under protection revealed that upon relocation there was always a preoccupation of apprehension and possible risk to their existence.699 These informal WPPs only reinforced perceptions that criminals allowed in the programmes were being licenced to commit more crimes.700 Difficulties in evaluating costs and effectiveness of these WPPs due to unreliable data from police officers led to moves for a more structured and organised WPP.701 According to Martin Innes' data analysis of a police force in the South of England from September 1995 to August 1996, £35,910 had been paid to police informants.702 This was compared to the Audit Commission Report of 1993 where an average spent on informants per force was £19,000.703 This resulted in 528 arrests and 531 crimes detected. This then represented an average of £68.01 per prisoner and £67.63 per crime detected.704 It was observed that these figures were glossed over averages since amounts varied largely for different types of crimes paid.705 In the six months ending 30th September 1992, Number Three Regional Crime Squad paid £26, 500 to informers.706 Further, in 1994 Humberside Police alone spent £46,000 to police informers representing a three-fold increase since 1991.707 Though these figures represent a justified increase in costs leading up to effective and structured WPP system, Morgan and Newburn argue that these figures may not necessarily take into account the expenses incurred during recruitment and cultivation of informants.708

699 Fyfe, & Mckay, *Op. Cit*, p.88.

700 Dunningham, C., & Norris, C., (1996) The Detective, the Snout and the Audit Commission: The Real Costs of Using Informants, 38(1) The Howard Journal, pp.67-86.

701 Innes, M., (2002) Professionalising the role of the Police Informant: The British Experience, 9(4) Policing and Society, pp. 357-384.

702 *Ibid*, p.374.

703 Audit Commission, (1993) Police Paper No. 12 - Helping With Enquiries: Tackling Crime Effectively, London, HM Stationery Office, p.39.

704 Innes, *Op. Cit*, p.374.

705 *Ibid.*

706 Dunninghan, C, Norris, C, *Op. Cit*, The Howard Journal, p.70.

707 *Ibid.*

708 *See generally*, Morgan, R, & Newburn, T (1997) The Future of Policing, Oxford, OUP.

Notwithstanding that the *ad hoc* goals of improving witness welfare resulted in major and glaring inconsistencies709 in the UK, its biggest challenge was a lack of a proper statutory basis until the Serious Organised Crime and Police Act, 2005 (SOCPA)710 came into effect. Following the enactment of SOCPA, witnesses were now accorded dignity in a designated and consistent protection service. 711 As opposed to legislation requiring accountability measures through agency reports, SOCPA does not indicate the kind of protection available and requires no accountability processes.712 In an adversarial system of justice that pursues truth telling,713 witness protective measures have been criticised for total disregard for the defendant's rights, due process, lack of public trial and lack of opportunity to effectively cross-examine a witness. 714 Clearly, witness protective measures do not obviate the necessity for a trial. The rationale for the system is to allow the witness to give evidence in a trial even if their identity is concealed. Further, WPP proponents have argued that protective measures balance the defendant's constitutional rights 715 and the Judge becomes an unbiased umpire716 between the defence and the prosecution. The difficulty of blending relocated witnesses into relocated areas is another challenge, leading to fears of their being recognised.717 Large families are also difficult to protect as it is costly to incorporate all

709UK Govt, (2006) New provisions on witness protection in the Serious Organized Crime and Police Act 2005, https://www.gov.uk/government/publications/new-provisions-on-witness-protection-in-the-serious-organised-crime-and-police-act-2005 last accessed on 21 January 2014.

710 This law has Witness Protection, Witness Immunity and Plea–Bargaining issues in it, http://www.legislation.gov.uk/ukpga/2005/15/notes/contents last accessed on 23 February 2014.

711 Sections 82–88 of SOCPA.

712 Sections 82–88 of SOCPA; Allum, F., & Fyfe, N.,(2008) Developments in State Witness Protection Programmes: Italian Experience in an International Comparative Perspective, 2(1) Policing, p.98.

713 Nargorcka, F., *et.al*,,(2005) Stranded Between Partisanship and the Truth–A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice, 29 Melbourne University Law Review, p.449.

714 Jeffress, W.H,(1984) The New Federal Witness Tampering Statute, 22 American Criminal Law Review,p.17.

715 Adams, C.A.,(1987) White–Collar Crime: Fourth Survey of Law, Substantive Crimes, Witness Tampering, 24 American Criminal Law Review, pp.755–756.

716 Darbyshire, P., (2008) Criminal Procedure in England and Wales in Vogler, R., & Huber, B., (Eds.) Criminal Procedure in Europe, p.60.

717 Fyfe, N.R, *et.al*, (2000) Witness Intimidation, Forced Migration and Resettlement: A British Case Study, 25(1) Transactions of the Institute of Geographers, pp.85-86.

family members.718 Criminal recidivism from infiltrated witnesses is another challenge.719 Use of police forces as actors in WPP is a fertile ground for defence allegations of witness coaching, 720 and a neutral unit organising and running WPP could help improve the situation. Despite challenges, it can be observed that witness protection became a relevant and established tool to the fight against organized crime in common law jurisdictions.

3.3 CIVIL LAW JURISDICTIONS

The necessity of fighting a wave of organised crime in the early 1990s became an important focus for many governments, leading to the use and protection of insider witnesses as a strategic tool. 721 Civil law jurisdictions also adopted Anglo-American-style protective measures to suit their needs.722 The success of anti-mafia trials in Italy depended heavily on the former mafia gang members called *pentiti*.723 For instance, during the *Maxiprocesso criminal trial* (Maxi Trial) against the Sicilian Mafia, Tommaso Buscetta and Salvatore Contorno former mafia bosses turned informants, gave testimony of the mafia activities leading to convictions and imprisonment of 475 mafioso for a multitude of crimes.724 It is observed that to a greater extent, the interactions between the judge in charge of examinations and the *pentiti* depended on the protective measures in place. To a certain extent this led to formation of diverse alliances among witnesses, unequal access to courtroom procedures and acceptance of various conflicting interpretations of *pentiti* commucative behaviours. 725

718 Abdel-Monet., (2003) Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong? 40American Criminal Law Review,pp.1250-1255.

719Schreiber, A, J., (2000-2001) Dealing With The Devil: An Examination of the FBI's Troubled Relationship With its Confidential Informants, 34Columbia Journal of Law and Social Problems, pp.321-337.

720 Fyfe, N, & Mckay, H, *Op. Cit*, p.290.

721 Allum, F., & Fyfe, N., *Op. Cit*, p.92.

722 UN,(2008) Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime, UNODC, New York, pp.7-15.

723 Fyfe, N, & McKay, H., *Op. Cit*, p.339.

724 Balsamo, A, (2006) Organised crime today: The evolution of the Sicilian mafia, 9(4) Journal of Money Laundering Control, pp. 373-378.

725 Jacquemet, M. (1996) Power Alliances in Court: Turning Turncoats into Witnesses, 30(3) Folia Linguistica, pp. 189-216.

Getting into the WPP726, former mafia associates would be supported and reintegrated into the community in exchange for their evidence.727 Overall, political responsibility for WPP rests with the Italian Ministry of the Interior.728 It decides who is selected for the program and the period and mode of protection.729 Operational authority is accorded to the Central Commission with professional membership of judicial officers and civil servants with powers to make authoritative decisions concerning welfare and order within the program, such as witness well-being730 and producing bi-annual reports to parliament through the Ministry of Interior. The Protection (Central and Local) Service runs practical day-to-day programmes.731 There is no authoritative guidance as to the exact nature of the danger requiring admission into WPP. 732 This leads to varied, inconsistent and problematic interpretations of witness welfare by decision-makers with obviously different observational standpoints and perspectives.733 Notwithstanding this, WPP has been described as Italy's secret anti-mob weapon that "has advanced immensely the fight against organised crime."734 It is thus suggested that the informer testimony such as the Maxi Trial, has played a crucial role in Italy's Mafia sweep. Other civil law jurisdictions such as Germany735 have set down admission guidelines namely; the gravity of the offence, the extent of the risk to a witness, the rights of the accused and the impact of the protective measures on both the accused and the witness.736 As regards total anonymity being fully granted, a law enforcement officer

726 Established by Laws 82 of 1991 and 45 of 2001.

727 Allum, F., & Fyfe, *Op. Cit*, p.93.

728Tak, P.J.P.,(1997) Deals with Criminals: Supergrasses, Crown Witnesses and *Pentiti*, 5(1) European Journal of Crime, Criminal Law and Criminal Justice,pp.18-19.

729Allum, F., & Fyfe, N., *Op. Cit*, p.93.

730 *Ibid.*

731Allum, F., & Fyfe, N., *Op. Cit*, p.97.

732 *Ibid*, pp.97-99.

733 *Ibid.*

734 Simpson, V,L, (2012) Italy's Secret Anti-Mob Weapon: Witness Protection, Associated Press, http://www.breitbart.com/news/da1t9mc81/, last accessed on 15 March 2014.

735 Vogler, R.,(1989) Germany: A Guide to the German Criminal Justice System, London, Prisoners Abroad, p.6

736 UN, *Op. Cit*, pp.7-13.

gives evidence in court in place of witness, stating what the witness saw. The defence can challenge the testimony as relayed by the law enforcement officer. Further, the defence has the right to submit in writing questions to be put to the anonymous witness by the reporting officer, who will subsequently report the answers to the court. The German Federal Court of Justice has ruled that, because of its largely hearsay character, such testimony has limited value unless corroborated by other material evidence.737 Belgium has a simplified mode of decision making whereby the mere fact that a statement has been recorded in connection with a criminal case puts such a witness, his family members or other relatives at risk.738 This makes it easier for a decision-maker to deal with discretion or the process of assessing any potential risks.

There have been and still are challenges for protective measures within civil law jurisdictions. Coordination is problematic and at times bureaucratic, leading to fears of slow-paced decision making739, misuse and a threat to civil liberties.740 Further, weaknesses in the effective working relationship between agencies and investigating judges on investigation teams involved in the initiation of procedural evidence collection puts the WPP in a precarious position. 741 Very bureaucratic and slow-paced decision-making is counterproductive for state organs that are required to be steps ahead of sophisticated742 criminals. 743 Further, an uncertain division of labour between the agencies and the investigative judges lead to confusion and an overlap of responsibility.744 Lack of a statutory

737 Council of Europe (2006) Terrorism: Protection of Witnesses and Collaborators of Justice (Strasbourg, Council of Europe Publishing, Also mentioned in the UNODC Good Practices, p.39.

738 Fyfe, N,& Sheptycki, J., *Op. Cit*,p.324.

739 Czech Republic system requires Supreme Court Judge as final decision maker on WPP admission, police or penitentiary president has temporal admission powers; Allum, F.,& Fyfe, N., *Op.Cit*, pp.96-97.

740 Schneider, J., & Schneider, P.,(2002) Suggestions from the Antimafia Struggle in Sicily,75(1)Anthropological Quarterly,p.156.

741 Certoma, G.L.,(1981) Accusatory System –v- The Inquisitorial System – Procedural Truth –v- Fact?, Criminal Evidence Law Reform Proceedings, pp.83-91.

742 Hanser, R.D.,(2011)Gang-related Cyber and Computer Crimes: Legal Aspects and Practical Points of Considerations in Investigations,25(1-2) International Review of Law, Computers and Technology, p.47.

743 Ayling, J., (2011) Gang Change and Evolution Theory, 56 Crime, Law and Social Change, pp.20-21.

744Chroma, *Op.Cit*, pp.83-91.

basis and institutionalization of WPP in some jurisdictions compromises witness welfare and safety as *ad hoc* measures are employed. The French system745 has experienced similar problems although providing physical and legal protection through the use of audio/audio-visual devices and anonymous testimony decided by regional police officers.746 The Chinese criminal justice system when dealing with organised crime747 is also hampered by abstract and general regulations on protective measures. 748 Even though witness testimony is important in the Chinese criminal justice syste, the testifying rate of witnesses is low due to the country's insufficient legislation, deficient protection system and the witness's anxieties about retaliation. 749 Prevailing protective measures for witnesses are insufficient to encourage them to testify.750 Attempts to ascertain the truth and protect witnesses become detrimental to the accused's defence when they are unjustifiable or undermine the rule of law.751 However, proponents of protective measures have argued that the ascertainment of the truth cannot be at any price including that of endangering the life or limb of a witness.752 In Austria, an investigative judge is at liberty to restrict witness, defendant or public participation in trial through audio or video transmission and the use of sworn affidavits.753 In Switzerland, an investigating judge can order protective measures for a witness that include hiding his identity from both the public and the defence.754 Despite opponents of such practice and measures being very critical of the courts, inventiveness, pragmaticism,

745 Vogler, R., (1989) France: A Guide to the French Criminal Justice System, London, Prisoners Abroad, pp.8-9.

746 Fyfe, N., & Sheptycki, J., *Op.Cit*, p.325.

747Zhang, X., (2001) The Emergence of 'Black Society' Crime in China, 1(2) Forum on Crime and Society, pp.53-72.

748 Jin, G.,(2006) The Protection and Remedies for Victims of Crime and Abuse of Power in China, 70 Resource Material Series,p.148.

749 Chang-Jian, G.A. O, (2012) Witness Protection and Defendant's Rights, 2 Journal of Southwest University of Political Science and Law, p. 4

750 Qun, Yang, (2011) An Analysis of the Witness Protection System in the Criminal Lawsuit of Our Country, 3 Journal of Wuzhou University, p. 5;

751 Hilger, J.P.W, (2001) Organized Crime/ Witness Protection in Germany, 58 Resource Material Series, p.104.

752 Certoma, G.L., *Op.Cit*, pp.83-91.

753 Fyfe, N.,& Sheptycki, J.,*Op. Cit*, p.324.

754 Arnold, R., *Op.Cit*, p.491.

efficiency and fairness to both the accused and the witnesses. 755 This proved effective within the Swiss witness protection system as demonstrated in the *Niyontenze Case*.756

Non-procedural protective measures have generally focused on physical safety and may well disregard the witness and his or her family's psychological well-being.757 The practice of relocating mafia witnesses from the south to northern Italy has been criticised as being culturally alien and disturbing.758 By contrast, Bosnia and Herzegovina have taken account of culture and customs as regards relocation.759Switzerland has recommended innovation and the improvision of short-term relocation 760 as a suitable option. These varied adaptations of protective measures unlike the adversarial system, are a result of the inquisitorial concept developing independently in various parts of the world761 with marked differences between various regional traditions. Therefore, it can be seen from the discussion above that protective measures within civil law systems of justice are varied, dependent on the complexities of crime in each jurisdiction and the level of costs involved. 762 Notwithstanding this, it is suggested that WPP within civil law jurisdictions has greatly contributed to an improved witness welfare.763

3.4 INTERNATIONAL CRIMINAL TRIBUNALS

755 Kasternberg, J.E, (2004) Universal Jurisdiction and the Concept of a Fair Trial Prosecutor v. Fulgence Niyonteze: A Swiss Military Tribunal Case Study, 12 University of Miami International & Comparative Review, p. 1

756 Reydams, L, (2002) Niyonteze v. Public Prosecutor, 96(1) American Journal of International Law, pp. 231-236.

757 Montanino, F., (1984) Protecting the Federal Witness: Burying Past Life and Biography, 27(4) American Behavioural Scientists, pp.50-528.

758 *See generally*, Varese, F., (2006) How Mafias Migrate: The Case of the Ndrangheta in Northern Italy, 40(2) Law and Society Review, pp.411-444.

759 Jusufspahic, A.,(2013) Witness Protection Program in Bosnia and Herzegovina in Cases of Organised Crime, 15(2) Varstvoslovje Journal of Criminal Justice and Security, pp.271-272.

760 Arnold, R., (2007) Witness Protection under Swiss Legislation: An Offspring of International Law, 7International Criminal Law Review, p.488.

761 Vogler, R., (2005) A World View of Criminal Justice, Aldershot, Ashgate, p.19.

762 Fyfe, N., & Sheptiycki, J., *Op. Cit*, p.27.

763 Fyfe & Sheptiycki, *Op. Cit*, pp.27-29.

Building on the work of the first generation of war crimes courts764, the UN established the special international criminal tribunals in the Former Yugoslavia, Rwanda, Sierra Leone, Lebanon, East Timor and Cambodia to deal with atrocities and grave breaches of humanitarian law. These tribunals developed a sophisticated jurisprudence relating to elements of three international crimes765, forms of participation in such crimes, general principles of international criminal law, procedural matters and sentencing.766 Although the giving of live evidence was a relevant procedure that international criminal tribunals needed in order to decide the fate of an accused person, such a procedure was often highly emotional and challenging to a witness.767 Further, in a considerable number of cases the location of the Court was at some distance from where the witnesses lived.768 Therefore, developing769 measures that would protect witnesses brought its own jurisprudential challenges.770 That notwithstanding, Chapter five will later discuss lessons learnt from these tribunals.

1. *AD HOC* TRIBUNALS

1. INTERNATIONAL CRIMINAL TRIBUNAL OF FORMER YUGOSLAVIA (ICTY)

Since the Nuremberg Judgment in 1946771, and despite the UN's adoption of the Charter of the International Military Tribunal in 1946772, no serious progress was made towards

764 See generally, Schabas, W., (2006) The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, CUP, Cambridge.

765 Genocide, Crimes against Humanity and War Crimes.

766 Schabas, *Op. Cit*, pp. 3-5.

767 Weber, R. (2010) Witness Protection at International Criminal Tribunals: Previous Experiences as Lessons for the Extraordinary Chambers in the Courts of Cambodia? 2 (1) City University of Hong Kong Law Review, p. 137.

768 *Ibid.*

769 Mundis, D.A. (2000) Improving the Operations and Functioning of the International Criminal Tribunals, 94(4) American Journal of International Law, p.759.

770 Grandson, C, *et.al*.,(2012)Updates From the International and Internationalized Criminal Courts, 19(2) Human Rights Brief, p.50.

771 Schwarzenberger, G., (1946-1947) Judgment of Nuremberg, 21(3) Tulane Law Review, p.329.

772 UN General Assembly Resolution Number A/Res/1/95, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/95(I)&Lang=E&Area=RESOLUTION last accessed on 2 February 2014.

establishing an international criminal court.773 Violent hostilities resulting from the dramatic political and social change across Eastern Europe shocked the world and especially Europe. 774 As a result, the ethnic cleansing of early 1993 in the Former Yugoslavia accelerated the adoption of a Security Council Resolution establishing the ICTY.775 Despite negotiations 776 , drafting and legal foundational problems difficulties, 777 the ICTY Statute 778 with a mixture of accusatorial and inquisitorial criminal justice procedural models779 became the main legal framework for the Tribunal. It has been argued that the process was undertaken to maintain order780 and promote basic community values781 such as national reconciliation.782

Witness protective measures were considered in relation to the ICTY Statute's Article 15783which accords the Judges powers to adopt procedure and evidence rules for numerous

773Crawford, J. (2002) The Work of the Law Commission in Cassese, A., Gaieta. P., Jones, J., (Eds.) The Rome Statute of the International Criminal Court: A Commentary, OUP, Oxford,p.23.

774 ICTY, The Tribunal – Establishment, http://www.icty.org/en/about/tribunal/establishment last accessed on 12 February 2016.

775 UN Doc. S/RES/808 (1993), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/808(1993) last accessed on 2 February 2014.

776Scheffer, D.J., (2004) Three Memories for the Year of Origin, 1993, 2(4) Journal of International Criminal Justice, pp.353-360.

777 Zacklin, R.,(2004) Some Major Problems in the Drafting of the ICTY Statute, 2(2) Journal of International Criminal Justice, pp.36-367.

778 ICTY, (2009) Updated Statute of the International Criminal Tribunal for Former Yugoslavia (Sept, 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf last accessed on 2 February 2014.

779 Ponte, C.D., (2006) Investigation and Prosecution of Large scale Crimes at international level, 4(3) Journal of International Criminal Justice, pp.543-545.

780 McDougal, M., (1974) Human Rights and World Politics: Principles of Content and Procedure for Clarifying General Community Policies, 14 (3) Virginia Journal of International Law, pp.381-388.

781 McDougal, M, & Berb, G., (1964) Human Rights in the United Nations, 58 American Journal of International Law, pp.603-605.

782 Peskin, V., (2013) Seeing Like a Court: Documenting Histories of Armed Conflict through the Lens of Judging International Crimes, 35(3) Human Rights Quarterly, pp.770-771.

783 Article 15: Rules of procedure and evidence: *The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.*

trial procedures including the protection of witnesses and victims. Further, Article 22,[784] points to the specific procedural provisions found in the ICTY RPE. The procedural measures have been interpreted as to include the protection of the accused person's rights[785] using measures that least infringed upon his rights including the right to public trial.[786] It was held in the *Milosevic case* that the variation of protective measures namely, the allocation of a different set of pseudonyms to witnesses who already had protective measures in the case of *Prosecutor -v- Simic et. al*, was justified and the result of a balancing act with the rights of an accused person because, the Simic case had a geographical, temporal and substantial overlap with the Milosevic case.[787] It is argued in this work that this is a balanced[788] and deliberate policy[789] effort towards the competing interests[790] of witnesses and the accused person. Considering that cross-examination is an essential character of a trial in an adversarial model, [791] the ICTY's procedure blended the inquisitorial and adversarial models of justice[792] in order to ensure that there is a right to a fair and public trial.[793] Therefore, in pursuance of this, a witness must be in attendance.[794] Accordingly, it has been held in the *Krajisnik case* that such attendance gives the accused person an opportunity to cross-examine the witness.[795] The burden of proof rests with the one seeking more extreme

784 Article 22: Protection of victims and witnesses: *The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity*.

785 *Prosecutor* v. *Delalie and Delie*, IT -96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, para 18.
786 *Prosecutor –v-Milosevic*, IT-02-54-T, TC, ICTY 30 July, 2002, para 5.

787 *Ibid*, page 4

788 Tieger, A., (2009) Cross-Examination in Cassese, A., (Ed.) The Oxford Companion to International Criminal Justice, Oxford, OUP, p.288.

789 McDougal, M., (1960) Some Basic Theoretical Concepts About International Law: A Policy–Oriented Framework of Inquiry, 4(3) Journal of Conflict Resolution, p.339.

790 Kahn, P.W., (1987) The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97(1) Yale Law Journal, p.3.

791 *Browne –v-Dunn* (1893) 6R 67, HL.

792 Ambos, K, (2003) "International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?" 3(1) International Criminal Law Review, pp.1-37.
793 Article 21(2) of ICTY.

794 Article 21(4)(e) of ICTY Statute

795 *Krajisnik Case* (ICTY) Decision Case No.IT-00-39-T, TC, 15 December, 2005.

protection to demonstrate or prove such risks796 that might lead to transcript redactions, pseudonym, voice797 or face798 distortion and non-disclosure of witness information.799 He or she therefore must demonstrate why this very crucial and fundamental right800 guaranteed by international human rights conventions801 must be departed from.802 In the cases of *Galic*803 and *Prlic*,804 the ICTY has held that more extreme protection measures of witnesses are only justified if they outweigh the fundamental right to due process of the accused person. Defrancia has argued that the defendant's right to confront witnesses is of essence and paramount importance to due process before the international criminal tribunals.805 It symbolizes 'fair play' in the adjudication of violations of ICL.806 In the context of the US criminal process it has been argued that the rationale of a right to confrontation is to "augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence." 807Thus Judge Stephen of the ICTY confirmed this argument by dissenting that granting "unqualified anonymity" to witnesses, as for the accused person and his counsel were concerned should be denied."808 He went on to argue that withholding from the Defence the name and other identifying data of a witness and

796 *Ibid, para* 5.

797 Rule 75(B) (i) of ICTY RPE.

798 *Prosecutor –v-Galic*, TC, ICTY 30 July, 2008, Disposition, para 7.

799 Rule 69 of ICTY RPE.

800 *Prlic and Others–v-Prosecutor* (ICTY), Decision on Joint Defence Interlocutory Appeal Case No.IT-04-74-AR73.2, AC, 4 July, 2006.

801 Article 14(3) (e) of ICCPR.

802 Rule 92*bis* ICTY RPE.

803 *Prosecutor –v-Galic, Op. Cit*, para 7.

804 *Prlic and Others–v-Prosecutor, Op. Cit*

805 Defrancia, C, (2001) Due Process in International Criminal Courts: Why Procedure Matters, 87(7) Virginia Law Review, pp.1381-1439.

806 Ibid, p.1383

807 *Ohio –v- Roberts*, 448, US 56, 65 (1980).

808 *Prosecutor –v- Tadic*, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for the Victims and Witnesses (August 10, 1995), http://www.icty.org/x/cases/tadic/tdec/en/50810pmn.htm last accessed on 08 February 2016.

allowing testimony to be given from a special room linked to the witnesses in a distorted and unrecognized form affected the right to confrontation and fair trial for the accused person.809 Despite this, ICTY has furthered the justification for witness protection. In the case of *Delalic* , where it has been held that in the event of a conflict between the protection of vulnerable witnesses and the requirement of a face-to-face confrontation, the latter must yield to the greater public interest in the protection of witnesses.810 This is based on a 'procedural equality' concept as confirmed in the case of *Aleksovski*, where "a fair trial means not only fair treatment to the defendant but also for the prosecution and witnesses."811 Fact-finding process is enhanced by loosening the right to confrontation and allowing witnesses to testify anonymously.812 It is a balancing effect of the procedural rights of the accused and witnesses.813 An accused person's access to fundamental fair trial rights is a key indicator of equality in any criminal justice system.814 Cassesse has argued that proceedings are likely to lose their credibility and integrity if there is no consistent application of due process standards.815 Therefore, it is suggested that tribunals have a duty to guarantee the fundamental rights of an accused person including the right to fair trial.816 Blanket application of protective measures should not be allowed. The defence should be able to address witness credibility issues. Appropriate protective measures should not be at the expense of fair judicial procedure.817 Despite this, regional human rights bodies have also

809 Ibid (Per Judge Stephen Dissenting Opinion).

810 *Prosecutor –v- Delalic*, Case No. IT-96-21, para 65 (Trial Chamber, ICTY, April 28, 1997).

811 *Prosecutor –v- Aleksovski*, Case No. IT-95-14/1-AR73, paras 23-25, (Appeals Chamber, ICTY, February 16, 1999).

812 Defrancia, *Op. Cit*, p.1414.

813 Momeni, M, (1997-1998) Balancing the Procedural Rights of the Accused Against a Mandate to protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugislavia, 41 Howard Law Journal, p.155.

814 Schomburg, W, (2009) The Rome of International Criminal Tribunals in Promoting Respect for Fair Trial Rights, 8(1) Northwestern Journal of International Human Rights, p.1.

815 Cassesse, A, (1997) The International Criminal Tribunal for the Former Yugoslavia and Human Rights, 4 European Human Rights Law Review, p.333.

816 Findlay, M, (2002) Internationalized Criminal Trial and Access to Justice, 2 International Criminal Law Review, p.251.

817 in *Kostovski –v- Netherlands*, (1989) 12 EHRR 434, para 44 & *Windisch v Austria*, (1990) 13 EHRR 281, paras 28, 30; *Ludi –v-Switzerland*, (1992) 15 EHIRR 173; *Saidi v France, (1994) 17 EHRR 251, 265*; Human

held that criminal justice systems should not unjustifiably imperil the interests of witnesses.818 Principles of fair trial in line with international and regional human rights mechanisms, require that there is a balance of defence interests against those of witnesses or victims.819 It is difficult to achieve a balance and equality of arms when there is anonymity of witnesses.820 However, it is suggested in this work that fair trial rights have an expansive interpretation whereby there is fair treatment to both the defendant and the prosecution including witnesses.821 In agreement with the position taken by the Office for Democratic Institutions and Human Rights (ODIHR), 822 it is argued here that depending on the circumstances of each case, the courts should be able to address issues of credibility in a way that counter-balances the right to confrontation for the accused person and anonymity testimony measures for the witnesses. Such an approach can secure justice, lasting goals and values that are more enduring.823 From this premise, it is legitimate to expressly link the integrity of the fact-finding process with the physical and psychological security of witnesses. Witnesses need these basic rights. ICTY proponents have further argued that the strongest

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Rights Committee, *Concluding Observations on Colombia*, UN Doe CCPR/C/79/ Add.75 (1997) at para 21; Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia* (1999) at paras 121, 123; United Nations, *Report on the Mission of the Special Rapporteur to Colombia* (30 March 1998) at para 160.

818 *Doorson v Netherlands*, (1996) 22 EHRR 330, para 70; *Van Mechelen v Netherlands*, (1997) 25 EHRR 647, paras 56-62; *Bocos-Cuesta v the Netherlands* [2005] ECHR, para 69*; S. N. v Sweden* [2002] ECHR, para 47; CoE Recommendation R(85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure; CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence; CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice; CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence, para 9.

819 Article 14(3)(e) of the ICCPR; Article 6(3)(d) of the ECHR*;* Articles 7 & 8(2) of the ACHR; Following Doorson, Council of Europe Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence, Recommendation No. R (97), 13, Adopted on 10 September, 1997, http://www.coe.int/t/dghl/standardsetting/victims/recR_97_13e.pdf, last accessed on 11 May 2016, stated that: "The Committee concluded that 'the only solution for striking a balance between the measure of anonymity and the rights of the defence would be the establishment of an *independent verification mechanism* capable of providing an effective substitutive form for the defendant and his counsel in the research of any doubtful circumstance that might seriously affect the reliability etc. of the anonymous witness", page 13, "It recommended that the verification procedure be carried out by an independent magistrate, not involved in the main proceedings, and further acknowledged that an overriding condition of any grant of anonymity must be that no conviction can solely or to a decisive extent be based on the evidence of anonymous witnesses", p.22.

820 Felde, K, McDonald, G, Tieger, A, Wladimiroff, M, (1998) The Prosecutor V. Dusko Tadic, 13 American University International Law Review, pp.1452, 1465-1466.

821 *Prosecutor –v- Aleksovski*, Case No. IT-95-14/1-AR73, paras 23-25, (Appeals Chamber, ICTY, February 16, 1999).

822 ODIHR & OSCE, (2012) Legal Digest of International Fair Trial Rights, Warsaw, OSCE & ODIHR, pp. 167-172.

823 Fairlie, M, (2003-2004) Due Process Erosion: The Diminution of live Testimony at the ICTY, 34 California Western International Law Journal, p.47.

degree of protection is the use of closed-door sessions where only participants directly involved in the case are available and that pseudonyms be the least measure used.824 It is further argued here that this is insufficient protection because closed sessions or pseudonyms cannot take away the psychological fears of a witness. Therefore, voice and face distortion rather than just merely closed session come closer to the approximate goal of witness protection.825 Another insufficient protection is in Rule 69(c) of the RPE that provides for the identity of a testifying witness to be revealed to the defence prior to trial, as a basic requirement of Article 21(4) (e).826 According to the holding in *Vjislav Seselj*, this does not instil confidence for the measures as it leaves such a witness completely exposed. 827 According to ICTY *trauvaux préparatoires,* protective measures need to have continued development through generous interpretation of ICTY RPE. 828 Therefore, despite early scepticism,829 it is suggested that the non-disclosure of witness identity or information to the defence, dependent on the circumstances of the case is one such development solution that would close this problematic gap.

Non-procedural protective measures are managed by the VWS under the guidance of the Registry, offering physical and psychological protection.830 It is not easy to provide non-procedural protective measures where there is an on-going conflict. In the *case of Tadic*, the Court considered this issue and noted that VWS's most troubling task was always to secure the safety of witnesses living in Former Yugoslavia and their families. 831 It has

824 Acquaviva, G, *et.al*. (2013) Trial Process in Sluiter, G, *et.al*., (Eds.) International Criminal Procedure: Principles and Rules, Oxford, OUP, p.826.

825 *Tadic* case.

826 Right to cross examination of a witness by the accused person.

827 *Prosecutor–v-Vjislav Seselj* (ICTY) Case No.IT-03-67-R77.2,TC, 31 October, 2011, publishing protected witnesses names.

828Report of the SG Pursuant to Para 2 of the SC Res. 808 (1993), UN Doc. S/25704, 3 May, 1993), para 108.

829 Stephen, N., (2004) A Viable International Mechanism, 2(2) Journal of International Criminal Justice, p.386.

830 Tolbert, D, & Swinnen, F.,(2006) The Protection of, and Assistance to Witnesses at the ICTY in Abtahi, H. & Boas, G.,(Eds.) The Dynamics of International Criminal Justice, Leiden, Martinus Nijhoff Publishers,pp.219-225

831 *Prosecutor –v-Tadic Case* (ICTY),Case No.IT-94-1-5.

dedicated832 VWS officers833 and not Judges who are decision-makers, working on advice or requests from the defence and prosecution responsible for interpretation and discretions arising from the ICTY's policy on the most vulnerable witnesses.834 Temporary relocation to The Hague for testimony requires considerable support and assistance from VWS, including follow up upon the return of the witnesses to their communities.835 It is thus argued here that this direct contact by VWS staff indicates the Tribunal's desire to secure the best client orientation while bearing in mind the programme's sensitivity for professional psychological support that will in the end achieve both witness rehabilitation as a human good836 and community reconstruction.837 Permanent relocation is another measure focused on by VWS. The vexing question is how possible is it for a Tribunal with no territorial jurisdiction of its own competently to relocate witnesses? It is argued that this is an extremely challenging task and a Tribunal is not in the position of a state to provide new identities and safe houses. It is solely dependent on the cooperation 838 of states and regional and international organizations through bilateral framework arrangements. These must have special focus on the cultural and environmental factors appropriate for those in the territory from which the witnesses originate.839 Moreover, VWS's operational mechanism carries an

832 Vohrah, L.C., (2004) Some Insights into the Early Years, 2(2) Journal of International Criminal Justice, p.394.

833 Lobwein, W.(2006) Experiences of the Victim and Witnesses Section at the ICTY in Ewald, U.,& Turkovic, K.,(Eds.) Large Scale Victimization as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post Conflict Societies, Amsterdam, OIS Press,p.202.

834 UNICRI, ICTY Manual on Developed Practices, Turin, UNICRI Publishers,pp.202–203, http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf , last accessed on 3 February 2014.

835 Colliard, C.,(2006) Mental Health in the Wake of War and Terrorism: Lessons From Humanitarian Experience in Victim Rehabilitation in Ewald, U & Turkovic, K.,(Eds) Large Scale Victimization as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post Conflict Societies, Amsterdam, OIS Press, pp.242–252.

836 Reisman, M, (1996) Legal Responses to Genocide and Other Massive Violations of Human Rights, 59Law and Contemporary Problems, p.75.

837 Pati, R.,(2012) Trading in Humans: A New Haven Perspective, 20(2) Asia Pacific Law Review, p.140.

838 Goldstone, R., (2004) A View From The Prosecution, 2(2) Journal of International Criminal Justice, pp.380–381.

839Rentaln, A.D., (2011) Cultural Defences in International Criminal Tribunals: A Preliminary Consideration of the Issues, 18Southwestern Journal of International Law, pp.268–270.

assessment challenge. A verifiable, identifiable and sustained threat as a risk measure is not suitable for a post–conflict society.840 It is argued here that it will be difficult to determine clearly whether a threat is a serious one warranting relocation and this may lead to underestimation or overestimation of risk with consequent extra expense.841

2. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

The three months842 genocidal and systematic massacre of moderate Hutus and Tutsis through an ongoing civil war conducted by Hutu militia and functionaries in 1994843 was shocking, egregious and a cataclysm with international consequences.844 UN negotiations culminated in the establishment of the ICTR in 1994. 845 The ICTR Statute, heavily dependent on ICTY RPEs, became the guiding legal framework for the court with witness protection taking one of the most prominent roles.846

Procedural protective measures within the ICTR are applicable to the hearing of evidence and the admissibility of the same in the courtroom. These are overseen by the Trial Chamber and comprise testimonial proceedings in *camera*, expunging the names and addresses of witnesses from the record, use of pseudonyms and closed circuit testimony.847 Articles 19(1)848 and 21849 of the ICTR address witness protection within the ICTR statute. Further,

840 Societies that have no proper security in place, no police enforcement to trust and work with as well.

841 Stover, E.,(2007) Witnesses :War Crimes and the Promise of Justice in The Hague, Philadelphia, University of Pennsylvania Press,p.81;Wald, P.M.,(2002) Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal, 5Yale Human Rights & Development Law Journal,p.223.

842 Morris, M., (1996–1997) Trials of Concurrent Jurisdiction: The Case of Rwanda, 7 Duke Journal of Contemporary and International Law, p.349.

843 Africa Rights, (1994) Rwanda: Death, Despair and Defiance, London, Tribute to Courage, pp.206–376.

844 Morris, M.,(1996–1997) Symposium: Justice in Cataclysm Criminal Trials in the Wake of Mass Violence, 7 Duke Journal of Comparative and International Law,p.319.

845 Akhavan, P., (1996) International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, 90American Journal of International Law, p.501.

846 Suiter, G., (2005) The ICTR and the Protection of Witnesses, 3(4) Journal of International Criminal Justice, pp.962-976.

847 Beijer, A., (1997) Threatened Witnesses in Criminal Proceedings, Deventer, Gouda Quint, pp.312-316.

848 ICTR shall ensure fair and expeditious trials in accordance with ICTR RPE with full respect to accused rights and victims and witness' protection.

ICTR RPEs provide for specific procedural provisions. Considering the ICTR's bias towards the adversarial justice system[850], these measures revolve around the accused persons' rights.[851] It has been held in the *Renzaho case* that live testimony is to be encouraged in order to assess witness demeanour and reliability.[852] The ICTR has developed a more robust witness protection mechanism than that of the ICTY, interpreting 'exceptional circumstances for granting protection'[853] liberally. For instance, the ICTR in the case of *Rutaganda* ordered a blanket witness protection for all witnesses..[854] It is the argument in this thesis that to a certain extent the blanket application of protective measures affects the due process rights of the accused persons and further they are prone to abuse as witnesses in no need of protection are covered. Further, the defence cannot properly prepare for trial. It has been suggested that the ICTR Statute allows for provisional release as a natural outcome of the presumption of innocence recognised by international law.[855] Further, in the case of *Nsengimana*, it has been suggested that the Statute provides for the withholding of a witness' identity for 21 days, thus making it impossible for the accused person to know the prosecution witnesses and to intimidate them.[856] Notwithstanding this, it is argued here and in agreement with the case of *Ndayambaje*, that that such a law cannot be interpreted as an exceptional circumstance that can override witness protective measures.[857]

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849 ICTR shall provide for witness and victims' protection in ICTR RPE and this shall include but not limited to in camera proceedings and victim's identity protection.

850 Jackson, J., (2009) Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy, 7(1) Journal of International Criminal Justice, pp.24–29.

851 Rules 34, 69, 75, 90 of RPE deal explicitly with the protection of witnesses.

852 *Prosecutor–v-Renzaho*, TC II, Case Number ICTR-97–3-1, 17 August, 2005.

853 Rule 69 of ICTR RPE.

854 *Prosecutor–v-Rutaganda*, Case No.ICTR-96-3-T, Decision on Protective Measures for Defence Witnesses P9 (July 13, 1998).

855 Rearick, J.D, (2003) Innocent Until Alleged Guilty: Provisional Release at the ICTR, 44 Harvard International Law Journal, pp.577-580.

856 *Prosecutor-v-Nsengimana*, Case No.ICTR-2001-69-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses PP22, 23 (Sept. 2, 2002).

857 *Prosecutor-v-Ndayambaje*, Case No.ICTR-96-8-A, Decision on Motion to Appeal against the Provisional Release Decision of Trial Chamber II of 21 October, 2002, (Jan.10, 2003).

As in ICTY practice858, psychological welfare was given priority and a psychologist or family member was allowed to be present during the testimony of a witness.859 The wholesale adoption of rules on anonymous witnesses for differing contexts of operation have been criticised as unjustified.860 Only in very specific circumstances and facts has the ICTR ordered disclosure of witness identities but still with heavy reliance on the jurisprudence of the *Tadic Case.*861 Clearly, as observed in the case of *Akayesu*, a successful cross-examination862 cannot take place if there is not enough preparation as regards a particular witness' testimony.863 Further, anonymous witness arguments appeared illogical in circumstances where the *Gacaca* Courts were making full disclosures of both victims and witnesses and proceedings were taking place within the perpetrators vicinity.864 The fact that other international criminal tribunals such as ICTR were flouting procedural rights cannot be a proper justification for doing so. Proponents of anonymity measures have suggested that such arguments disregard the circumstances of the commission of the crime865 as witness protection is more than just physical protection.866 Anonymous testimony is a human good that any society that has experienced grave crimes such as genocide should cherish in order to

858 Cisse, C., (1997) International Tribunals for Former Yugoslavia and Rwanda: Some Elements of Comparison, 7Transnational Law and Contemporary Problems, p.116.

859 Oosterveld, V., (2005) Gender–Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court, 12New England Journal of International and Comparative Law, p. 127-130.

860Pozen, J., (2005–2006) Justice Obscured: The Non- Disclosure of Witnesses' Identities in ICTR Trials, 38 New York University Journal of International Law and Politics,p.282.

861 *Bagosora, Case* No. ICTR 98–41–T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December, 2001,(18 July,2003).

862 *Prosecutor–v-Akayesu* Case No.ICTR–96–4–T, 2 September, 1998, para155.

863 Leigh, M, (1997) Witness Anonymity is Inconsistent with Due Process, 91 American Journal of International Law, p.80.

864 Uvin, P., & Mironko, C. (2003) Western and Local Approaches to Justice in Rwanda, 9 Global Governance, p.226.

865 Chinking, C., (1997) Due Process and Anonymous Witnesses, 91American Journal of International Law, p.75.

866Affolder, N.A, (1998) Tadic, The Anonymous Witness and the Sources of International Procedural Law, 19 Michigan Journal of International Law, p.445.

achieve psychological well-being and the rebuilding of community policies867 and public order868 making it once again a free society869 with human dignity as its basic value.870 A critical look at the applicability of procedural protective measures871 suggests that there is use of an objective test as held by ICTR in the case of -*Nteziryayo*. This is based on whether or not witness security is at stake.872 Further to this, the case of *Kajelijeli* has held that flexible considerations of security volatility in Rwanda and the neighbouring countries need to be taken into account873 This will increase the chance of effective protective measures. Notwithstanding this, it is arguable that protective measures orders are not intrusive to the accused874 but are a positive contribution to a balanced attainment of international criminal justice.875

Non-procedural protective measures are operated by the Victims and Witness Support Section (VWSS) with the Registrar having oversight. There is impartial support in the form of physical and psychological rehabilitation, especially to sexual violence victims.876 VWSS works closely with the Trial Chamber on possible protective measures especially during

867 McDougal, M, Lasswell, H, Chen, L.,(1974–1975) Protection of Respect and Human Rights: Freedom of Choice and World Public Order, 24American University Law Review, pp.919- 927.

868 McDougal, M.S., (1952) Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order, 1(1) American Journal of Comparative Law, pp.24-30.

869 McDougal, M.S, (1966-1967) Jurisprudence for a Free Society, 1 Georgia Law Review, p.1.

870 Willard, A.R, (1998-1999) Myres Smith McDougal: A Life of and about Human Dignity, 108 Yale Law Journal, pp.927-934.

871 Rule 75 of ICTR RPE.

872 *Prosecutor–v-Nteziryayo*, ICTR– 97–29–T, Trial Chamber II, 18 September, 2001, para 6.

873*Prosecutor –v- Kajelijeli*, ICTR–98–44A-T, TC II, 3 April, 2001, para 1, 17-24.

874 Morris, V, & Scharf, M.P., (1998) International Criminal Tribunal for Rwanda, New York, Transnational Publication, pp.537-538.

875 Flakey, J.L, (1995) United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International; Tribunal for Former Yugoslavia, 19 Fordham International Law Journal,p.475.

876Obote-Odora, A., (2005-2006) Rape and Sexual Violence in International Law: ICTR Contribution, 12 New England Journal of International and Comparative Law, p.44-157.

trial877 but these do not extend the obligations imposed on States for refugee witnesses.878 It has been held in the case of *Ntegerura* that the ICTR Statute does not prevent states from expelling witnesses from their territory.879 Further, the case of *Ndayambaje* held that such prerogative of expelling witnesses belongs to the host State and not the Court as was the case with the ICTR. which is a State's sovereign prerogative and not that of the ICTR. 880 Therefore, reliance on historical assumptions about sovereignty and international law is dangerous and mistaken.881 The internal human rights situation is no longer a concern for a particular state but the international community.882 It is argued that the ICTR approach on refugee witnesses is not in conformity with modern international relations where states interact with one another on a governmental level and at all possible levels including communications through international institutions. 883 This interaction may comprise requests and cooperation.884 From another angle, it can be argued as was the the case in *Nyiramusuhuko* that the refusal of protective measures for refugee witnesses885 was made pursuant to the best interests of judicial assistance, cooperation and international refugee law.886 Most of the refugee witnesses either had pending extradition requests887 or were

877Sluiter, G.,(2002–2003) International Criminal Proceedings and the Protection of Human Rights, 37 New England Law Review,p.947.

878 Article 28 of ICTR Statute

879 *Prosecutor–v-Ntagerura*, ICTR-96–10–1, TC III, 4 February, 2000, para 2-3.

880 *Prosecutor–v-Ndayambaje*, ICTR-96-8-T, 27 January, 1997; this highlights some important considerations. It has been argued by some contemporary scholars in international law that sovereignty cannot be interpreted as freedom from legal restraint. Thus Article 2(7) of the UN Charter, broadly interpreted in line with international human rights law development, gives the UN much more scope to intervene in what was previously considered an exclusive competence of a state see, Barker, J.C.,(2004) International Law and International Relations: International Relations for the 21st Century, London, Continuum,pp.42-43.

881Paust, J., (2010-2011) Non-State Actor Participation in International Law and the Pretense of Exclusion, 51Virginia Journal of International Law, p.977.

882 Reisman, W,M, (1990) Sovereignty and Human Rights in Contemporary International Law, 84 American Jounral of International Law, p.869.

883McCorquodale, R., (2004) An Inclusive International Legal System, 17Leiden Journal of International Law, pp.489–492.

884Ljuboja, L.,(2009) Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness, 32Houston Journal of International Law,p.779

885*Prosecutor–v-Nyiramusuhuko*, ICTR-97-21-1, 19 January, 1998.

886 Article 1A (F) of UN Convention Relating to the Status of Refugees.

suspected criminals who could not be protected by refugee law.888 Other VWSS problems include a lack of proper follow-up for witnesses who have testified, leading to their death or serious injury.889 Funding is another big problem for the VWSS890 as inadequate resources hamper balanced witness coordination. 891 Notwithstanding these difficulties, the ICTR handling of obligations and mandate has had a considerable impact892 on national witnesses' welfare programs 893 and represented a learning 894 process for the jurisprudence of international criminal court witnesses895 and the mixed tribunals.896

1. THE HYBRID OR MIXED TRIBUNALS

1. THE SPECIAL COURT FOR SIERRA LEONE (SCSL)

The civil war which was fuelled by 'blood diamonds'897 was waged in Sierra Leone for eleven years with extreme brutality, led to calls for international criminal accountability898

887 *Prosecutor–v-Theonesto Bagosora*, Decision on the Extremely Urgent Request Made by the Defence for Protective Measures for Mr. Bernard Ntuyahaga, ICTR-96-7-1, 13 September,1999.

888 Othman, M.,(2003)'Protection' of Refugee Witnesses by the International Criminal Tribunal for Rwanda, 14(4) International Journal of Refugee Law,pp.506–507.

889Obote-Odora, *Op Cit*,p.144.

890O'shea, A., (2003) *Ad hoc* Tribunals in Africa: A wealth of Experience but a Scarcity of Funds, 12(4) African Security Review, pp.17–24.

891 Obote-Odora, *Op.Cit*, p.145.

892 Mose, E,(2005–2006) ICTR: Experiences and Challenges, 12 New England Journal of International and Contemporary Law,pp.1-6

893 For instance in Switzerland, Arnold, *Op. Cit*, p. 483

894 Oosterveld, V., (2005) Gender -Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons for the International Criminal Court, 12 New England Journal of International and Comparative Law, p. 119

895Dieng, A.,(2001-2002) International Criminal Justice: From Paper to Practice–A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court, 25Fordham International Law Journal , p.688.

896 Weber, *Op. Cit*, p. 137.

897 Montague, D.,(2002-2003) The Business of War and the Prospects for Peace in Sierra Leone, 9 Brown Journal of World Affairs,p.229.

898 Fritz, N., & Smith, A.,(2001-2002) Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, 25Fordham International Law Journal,p.391

for those who had committed heinous crimes.899 This was a remarkable response to the continued changing nature and structure of international law900 and world community order. 901 A treaty based SCSL 902 was established running in parallel with and complementary903 to the Truth and Reconciliation Commission (TRC).904 It became the first hybrid tribunal with national judges sitting alongside international judges with the responsibility of not pursuing low and mid-level perpetrators but only those bearing the greatest responsibility for the atrocities.905

Procedural and non-procedural witness protective measures are grounded in the SCSL statute906 and the SCSL RPE907 with a Registrar-led VWU908 having implementation primacy in consultation with OTP, defence and NGOs. This was done with the intention of balancing protection needs with the accused's right to fair trial. 909 SCSL's procedural measures ensured a bias towards live testimony as a way of demonstrating fairness and

899 Cryer, R.,(2001) A 'Special Court' For Sierra Leone?, 50International and Comparative Law Quarterly,p.435

900 McDougal, M.,& Reisman, M.,(1965) The Changing Structure of International Law: Unchanging Theory for Inquiry, 65Columbia Law Review,p.810

901 McDougal, M.,& Lasswell, H.,(1959) Identification and Appraisal of Diverse Systems of Public Order, 53(1)American Journal of International Law,p.1

902 UN SC Res.1315 of 2000, pp.1-2; http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&, last accessed on 18 February 2014.

903 McDonald, A.,(2002) Sierra Leone's Shoestring Special Court, 84International Review of the Red Cross,p.122

904 Schocken, C., (2002) The Special Court for Sierra Leone: Mixed Overview and Recommendations, 20Berkeley Journal International Law, pp.436-437.

905Dickinson, L., (2003) The Promise of Hybrid Courts, 97American Journal of International Law, p.295; Article 1(1) of SCSL Statute.

906 Article 16 of SCSL Statute.

907 Rule 34(A), 34(B), 34(A) (iii), 34(A) (ii), & 26*bis* of SCSL Statute RPE.

908 Horn, R, et. *al*., (2009) Testifying in an International War Crimes Tribunal: The Experience of Witnesses in the Special Court for Sierra Leone, 3International Journal of Transnational Justice, pp.135-136.

909 DiBella, A.E, (2013) Witness History: Protective Measures at the Special Court for Sierra Leone, in Jalloh, C.C.,(Eds.) The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law, New York, CUP, p.428.

credibility.910 The *Charles Taylor* trial, where a total of 115 live witnesses were called, with 94 for the prosecution and 21 for the defence, is an example of the Court's commitment to *viva voce* evidence.911 Notwithstanding this, *viva voce* testimony was still subject to the Court's commitment to witness and victim protection;912 a unique development913 for international criminal trial procedure. 914 Thus the VWU organised witness identity concealment through the use of screens to shield a witness from the public gallery, witness identity only known to the witness' legal team, face and voice distortion, trial record redactions and closed sessions. Non-procedural measures have relied heavily on psychosocial support915, safe houses, protected accommodation before or after testimony, similar country relocation where necessary and possible transfer back home if relocation was no longer necessary.916 Follow-up visits by the VWU staff included verifying any negative impacts from testifying such as security threats or psychological effects. It is argued here that, notwithstanding witness protective measures being deeply problematic,917 good interaction between the VWU staff and witnesses has led to proper coordination and successful protective measures implementation. 918 This is so because the VWU staff properly coordinated logistical arrangements as a link between the witnesses and the lawyers.919 This

910 *Ibid*, p.429.

911 *Prosecutor–v-Charles Ghankay Taylor*, Case No.SCSL-03-01-T, TCII, 18 May, 2012, para 169.

912 Article 17(2) of SCSL Statute.

913 Goldschneider, A., (2004–2005) Choose Your Poison: A Comparative Constitutional Analysis of Criminal Trial Closure–v-Witness Disguise in the Context of Protecting Endangered Witnesses at Trial, 15George Mason University Civil Rights Law Journal, p.25.

914 Afforder, N., (1997–1998) Tadic, the Anonymous Witness and the Sources of International Procedural Law, 19(2) Michigan Journal of International Law, p.452.

915 Horn, R., *Op. Cit*, p.135.

916 Oosthuizen, G., & Schaeffer, R., (2008) Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL, 3(1) Hague Justice Journal, p.52.

917Eaton, S., (2003–2004) Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime, 35 Georgetown Journal of International Law, pp.891-893.

918Charters, S, *et. al*,(2008) Best-Practice Recommendations for the Protection and Support of Witnesses: An Evaluation of the Witness and Victims Section, Freetown, Special Court for Sierra Leone.

919 Horn, R, Charters, S, & Vahidy, S, (2009) Witnesses in the Special Court of Sierra Leone: The Importance of the Witness-Lawyer Relationships, 37(1-2) International Journal of Law, Crime and Justice, pp.31-32.

led to improved confidence and guidance for witnesses, promotion of respect for witnesses, improved trust, friendliness, and dependence of witnesses on the system.920

Challenges to the protective measures have been slow and have lengthened trials due to the protracted litigation necessary. For instance, the *Charles Taylor* trial took two months and thirteen days to consider the protective measures alone921 and the decision took another two months and eight days.922 Finances have been another problem with prosecution witnesses being favoured over other witnesses. For instance, concerns were raised by the defence in the *Taylor* trial during the pre-trial conference, about the lack of finances putting them at a disadvantage or their inability to compel witnesses to testify as opposed to insider witnesses923 for the prosecution. Therefore, the defence expressed its intention to seek protective measures for its witnesses.924 In the same area of financial concerns, witness expectations in some cases extended to disappointment about hope for financial freedom.925 It is argued herein that the budgetary constraints of the Special Court, 926 funded as if it were a domestic court927, in some cases compromised the witnesses' well–being. It is suggested that witness safety should not be interpreted as financial salvation. Better understanding, training and communication skills for VWU need to be provided so as to guide them in conveying realistic expectations to potential witnesses.928 Mistrust between the prosecution and defence in terms of protective measures for witnesses contributed to a lack of

920 *Ibid.*

921 *Prosecutor–v-Charles Taylor*, Decision on Confidential Prosecution Motion to Rescind and Argument Protective Measures for Witnesses, Case No. SCSL–03-01-T-318, 16 July, 2007.

922 *Prosecutor–v-Charles Ghankay Taylor*, Case No.SCSL-03-01-T-348, 3rd October, 2007.

923 Cockayne, J., (2004-2005) Fraying Shoestring: Rethinking Hybrid War Crimes Tribunal, 28 Fordham International Law Journal, p.673.

924 *Prosecutor–v-Charles Ghankay Taylor*, Case No.SCSL-03-01-T, Transcript para 24–25, 7 May,2007

925 DiBella, A.E., *Op. Cit*, p.442.

926 Reader, O.Y.E., (2004) Special Court for Sierra Leone: Some Constraints, 8(3) International Journal of Human Rights, pp.249.

927 Sriram, C.L.,(2005-2006) Wrong-Sizing International Justice–The Hybrid Tribunal in Sierra Leone, 28(3)Fordham International Law Journal, p.473.

928 DiBella, *Op. Cit*, pp.443-444.

coordination between them. For instance, suspicions on the part of the prosecution on possible leaks of the witnesses' identity led to Court turning down a prosecution application for an order for the maintenance of a login of each individual member of the defence team who had access to confidential information.[929] It is suggested that mutual trust[930] is required for all participants within the Special Court, regarding their roles, as an international obligation.[931] As organs[932] of the Special Court, their interests are best secured by encouraging mutual trust and respect in order to fulfil[933] the SCSL's goals. Notwithstanding the aforementioned challenges, the Special Court has helped develop the well-being of witnesses.[934] It led to an establishment of a pioneering witness protection scheme for the national criminal justice system in Sierra Leone.[935]

2. THE SPECIAL PANELS FOR SERIOUS CRIMES IN EAST TIMOR (SPSC)

At the end of Suharto's dictatorship, East Timor was granted an opportunity for an independence referendum from Indonesia in 1998 and the victory for pro-independence forces resulted in killings, displacements and the destruction of property.[936] The UN created the International Force East Timor (INTERFET), to restore order[937] that was later succeeded by the United Nations Transitional Administration for East Timor (UNTAET) aimed at a

929 *Prosecutor–v- Gbao*, Case No.SCSL-2003-09-PT, 10 October, 2003, per Boutet, J.

930 McDougal, M, *et.al*,(1977-78) Aggregate Interest in Shared Respect and Human Rights: Harmonisation of Public Order and Civic Order, 23(2)New York University School of Law Review,p.183.

931 Schachter, O., (1967-1968) Towards a Theory of International Obligation, 8 Virginia Journal of International Law, p.300.

932 Higgins, R., (1978) Conceptual thinking about the Individual in International Law, 4(1) British Journal of International Studies, p.1.

933 McDougal, M, *et. al*., (1977) Social Setting of Human Rights: The Process of Deprivation and Non-Fulfilment of Values, 46 Revista Juridica Universidad de Puerto Rico, p.447.

934 Horovitz, S., (2013) How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone, 46 Israel Law Review, p.362.

935 *Ibid.*

936 Cohen, D., (2007) Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future, 43 Stanford Journal of International Law, pp.6–7.

937 UN SC Res.1264, U.N. Doc. S/RES/1264 (Sept.15, 1999).

general mandate 938 of accountability through a judicial mechanism. 939 The UNTAET created the SPSC, comprising two international judges and one Timorese judge, and international and national law for war crimes and crimes against humanity investigations.940

The SPSC provided that appropriate measures be adopted to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses941 but no procedural rules were set down to allow protective measures to be implemented. Scholars have described the SPSC as a chaotic hybrid court and witness handling as mediocre.942 This confirmed initial fears that the general mandate for UNTAET lacked a clear goal for the SPSC and led to its failure. 943 VWU had no funding for basic staff training and operations. 944 Considering the nature of offences dealt with, there was a clear need for witness counselling programmes945 but none was available. It is argued that the embedding of SPSC into the general budget of UNTAET946 heavily compromised the Court's work and demonstrated the low level of seriousness accorded to it.947 It is argued here that severe shortcomings948, a

938 Cohen, D., *Op. Cit*, pp.6-8.

939 UN SC Res.1272, U.N Doc. S/RES 1272 (October, 25, 1999).
940Katzerstein, S., (2003) Hybrid Tribunals: Searching for Justice in East Timor, 16 Harvard Human Rights Journal, pp.245-246.

941 UNTAET, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UNTAET/REG/2000/15 (June, 2000), para .24.1.

942 Cohen, *Op. Cit*, pp.6-8.

943 *Ibid.*

944 Cohen, D., (2006) 'Justice on the Cheap' Revisited: The Failure of Serious Crimes Trials in East Timor, 80 Asia Pacific Issues, pp.5-18.

945 Kumar, D.A., & Lathrop, S., (2012) Patterns of Trauma in Conflict Victims from Timor Leste, 57(1) Journal of Forensic Sciences, pp.3-5.

946 Martin, I., & Mayer-Rieckh, A, (2005) United Nations and East Timor: From Self-Determination to State Building, 12(1) United Nations Peace Operations and Asian Security, pp.125-145.

947Othman, M.C., (2005) Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor, Berlin, Springer, pp.99–131.

948 Pampalk, M., (2010) Accountability for Serious Crimes and National Reconciliation in Timor-Leste: Progress or Wishful Thinking? 3(1) Austrian Journal of South-East Asian Studies,p.15.

lack of support from East Timor949 and Indonesia950 and a dangerously weak criminal justice system951 seriously undermined the hybrid court.

3. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

Calls for accountability952 for the Khmer Rouge atrocities953 led to the establishment of the ECCC in 2001.954 It comprised a mixture of international and national judges, national and international co-prosecutors with the application of both national and international law.955 In order, so it was argued, to embrace world community values,956 ECCC law provided for public and open trials, and that closed proceedings demanded exceptional circumstances and good cause.957 Notwithstanding this, the sensitivity of the Cambodian situation required effective witness protective measures. 958 Thus, witness and victim protection was entrusted to co-investigating judges, the co-prosecutors and the Extraordinary Chambers, in the form of

949 Strohmeyer, H., (2001) Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, 95(1) American Journal of International Law, pp.50-54.

950 Bowman, H.D., (2004) Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor, 18Emory International Law Review, pp.371-380.

951 Linton, S., (2001) Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor, 25Melbourne University Law Review, pp.133–138.

952 Linton, S., (2007) Putting Cambodia's Extraordinary Chambers into Context, 11Singapore Year of International Law, pp.189-190.

953 *See generally* Kierman, B., (1996) Pol Pot Regime: Race, Power and Genocide in Cambodia Under the Khmer Rouge, 1975–1979, New Haven, Yale University Press.

954 http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf (last accessed on 24/02/2014);

http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last accessed on 23/02/2014).

955Linton, S.,(2002) New Approaches to International Justice in Cambodia and East Timor, 84 International Review of the Red Cross, pp.94-97.

956 McDougal, M.S., (1952) Comparative Study of Law for Policy Purposes: Value Clarifications as an Instrument of Democratic World Order, 1American Journal of Comparative Law, pp.24-57.

957 Article 34 of ECCC Law.

958 Weber, R., (2010) Witness Protection at the International Criminal Tribunals: Previous Experiences as Lessons for the Extraordinary Chambers in the Courts of Cambodia? 2(1) City University of Hong Kong Law Review,p.139.

in camera proceedings and the protection of witness identity.959 The ECCC provided for a unique arrangement where victims could not appear as witnesses but were to join the proceedings as civil parties and claim reparations.960

ECCC Internal Rules provide for procedural and non-procedural protective measures,961 empowering the ECCC to enter into supplementary agreements for security, safety and to establish practice directions that ensure the safety of life and well-being of witnesses and victims (including their families). 962 Responsibility for both measures was vested in the Co-Investigating Judges and the Chambers963 and the measures should only be requested not later than witnesses list filing date 964 with exceptional circumstances for late applications.965 Procedural protective measures included audio or video technology,966 in *camera* testimony967 and non-disclosure of witness identity and evidence.968 Further to this, procedural records need to be sealed969; witness statements with no identity970 and witness identity recorded in a classified register separate from the case file.971 Witnesses could also be protected through the declaration of a witness contact address as being that of their

959 Article 23 of ECCC Agreement

960 Leyh, B.M., (2012) Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls, 12 International Criminal Review, pp.387-389.

961 ECCC, (2011) Extra-Ordinary Chambers in the Courts of Cambodia: Internal Rules (August, 2011), http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf last accessed on 25 February 2014.

962 Rules 29(1), 29(3) of ECCC Rules.

963 Rule 29(4) of ECCC Rules.

964 Rule 29(3) of ECCC Rules.

965 *Ibid.*

966 Rule 26 of ECCC Rules.

967 Rules 28(7) (b), 29(4) (e) of ECCC Rules.

968 *Ibid.*

969 *Ibid.*

970 Rule 29(4) (c) of ECCC Rules.

971 Rule 29(5) of ECCC Rules.

lawyers or the Victims Association only or the ECCC972; use of pseudonym973, voice or face distortion and remote participation.974 There is need for balancing effect between the rights of the accused person and the interests of the witnesses. This is one way of achieving justice.975 Therefore, no technology used by the ECCC was allowed to prejudice or to be inconsistent with defence rights.976 Further, no conviction may be pronounced against an accused person on the sole basis of statements taken under adopted identity protective measures.977It has to be observed that the question of reparations was one of the problematic areas of the ECCC, due to the huge number of victims.978

Non-procedural measures may comprise physical protection, safe residence within Cambodia or outside and relocation and these measures are ordered only by Co-Investigating Judges and the Chambers.979 Appeals against such decisions have no suspensive effect except on decisions lifting such measures.980 The period within which the atrocities took to be addressed resulted in witness suffering and post-traumatic stress disorder.981 Contrary to rational982 expectation for such suffering983, both ECCC Law and ECCC Rules had no

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972 Rules 29(2) and 29(4) (a) of ECCC Rules.

973 Rule 29(4) (b) of the ECCC Rules.

974 Rule 29(4) (d) of the ECCC Rules.

975 Yesberg, K, (2009) Accessing Justice Through Victim Participation at the Khmer Rouge Tribunal, 40 Victoria University of Wellington Law Review, p.555.

976 Necessity of an appropriate balance, Rule 26 of ECCC Rules.

977 Rule 29(6) of ECCC Rules.

978Leyh, B.M., (2012) Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls, 12 International Criminal Review, pp.387-389.

979 Rule 29(7) of ECCC Rules.

980 Rule 29(9) of ECCC Rules.

981Mollica, R, *et.al*. (1998) Does the Effect Relationships of Trauma to Symptoms of Depression and Post-Traumatic Stress Disorder Among Cambodian Survivors of Mass Violence, 173 British Journal of Psychiatry, p.482.

982 McDougal, M.S., *et.al*, (1949) Rights of Man in the World Community: Constitutional Illusions Versus Rational Action, 59Yale Law Journal, p.60.

983Mollica, R.F., (2002) Science Based Policy for Psychosocial Interventions in Refugee Camps: A Cambodian Example, 190(3) Journal of Nervous & Mental Disease, pp.158–166.

provisions for psychological assistance to witnesses. ECCC entered into agreements with NGOs984 for psychological support agreements. This has contributed towards the weakness of protective measures as the NGOs are not part of the ECCC and cannot be relied upon in the same way reliance would be put on the Victims Support Section (VSS).

Lack of resources coupled with an inefficient criminal justice system has been a constant challenge to the protective measures regime. For instance, a US$ 50 million budget for three years was optimistic and unlikely to produce any tangible results in a dysfunctional criminal justice system.985 Inclusion of victims as civil parties rather than as witnesses is another challenge for the ECCC. Notwithstanding that some scholars strongly advocating that the investigative judge system is more efficient,986 it is argued here that the ECCC investigative judge system slows the efficiency of case processing as it is duplicative, protracted, redundant as well as adjudicative.987 Notwithstanding these challenges, the positive,988 general trickle-down effect on the domestic judicial system has been profound. For instance, human rights experiences including the protection of victims and witnesses has had profound consideration. This has been mainly within the areas of justice and human rights consolidation as well as reconciliation in post-conflict Cambodian judicial system989

4. THE SPECIAL TRIBUNAL FOR LEBANON (STL)

984 Trans-Cultural Psych-Social Organization and Centre for Social Development; McGrew, L.,(2009) Re-Establishing Legitimacy through the Extraordinary Chambers in the Courts of Cambodia in Lilja, M.,& Ojendel, J.,(Eds.)Beyond Democracy in Cambodia: Political Reconstruction in a Post Conflict Society, Copenhagen, Nordic Institute of Asian Studies Press,p.250.

985 Linton, S., (2006) Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers, 4Journal of International Criminal Justice, p.335.

986 Cleave, V., & Rachel, A., (1997) An Offer You Can't Refuse--Punishment without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System, 11 Emory International Law Review, p. 419.

987 Zimmer, M.B., (2011) The Challenge of Judicial Reform in Post-Conflict States, 37 Ohio Northern University Law Review, p.688.

988 Menzel, J., (2008) Justice Delayed or Too Late for Justice? Khmer Rouge Tribunal and the Cambodian Genocide, 1979-1979, 9 Journal of Genocide Research, p.227.

989 Dicklitch, S., & Malik, A., (2010) Justice, Human Rights and Reconciliation in Post-Conflict Cambodia, 11(4) Human Rights Review, pp. 515-530.

Following the 14th February 2005 attack on the Lebanese Prime Minister Rafi Hariri's life and other related attacks, the STL**990** was proposed as the only solution that would provide transparency and accountability.**991** The Statute of the Special Tribunal for Lebanon (STL Statute)**992** and Rules of Procedure and Evidence (STL RPE)**993** were drafted in 2007. Notwithstanding its critics arguing that the STL being established under UN Security Council Resolution is no more international in nature than an institutions such as the national police force,**994** STL is a hybrid tribunal with a mixture of national**995** and international**996** law on the one hand and inquisitorial and adversarial system on the other.**997**

Witness protective measures were entrusted to Registry VWU.**998** The VWU is mandated to consult the OTP regarding the physical and psychological well-being of witnesses.**999** Strangely, there is no provision for consultation with the defence, yet such provisions clearly impact on fair trial rights. Procedural measures allow receipt of evidence *viva voce* by Chambers **1000** or video conference link (VLC) testimony, *in camera* **1001** , use of

990 UN SC Res.1757 of 2007, UN Doc. No. S/RES/1757; Fassbender, B.,(2007) Reflections on International Legality of the Special Tribunal for Lebanon, 5 Journal of International Criminal Justice,p.1092.

991 Kassis, M., (2010) Justice or Peace? The Hariri Assassination and the Special Tribunal for Lebanon, 4(6) Perspectives on Terrorism, p.5.

992 http://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/security-council-resolution-1757, last accessed on 27 February 2014..

993 http://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence, last accessed on 27 February 2014.

994 Schabas, W., (2008) Special Tribunal for Lebanon: Is a 'Tribunal of an International Character Equivalent to an 'International Criminal Court'? 21Leiden Journal of International Law, p.523.

995Sader, C., (2007) A Lebanese Perspective on the Special Tribunal for Lebanon, 5 Journal of International Criminal Justice, p.1083.

996Aptel, C., (2007) Some Innovations in the Statute of the Special Tribunal for Lebanon, 5 Journal of International Criminal Justice, p.1107.

997 Gillet, M., & Schuster, M., (2009) The Special Tribunal for Lebanon Swiftly Adopts Its Rules of |Procedure and Evidence, 7(5) Journal of International Criminal Justice, p.886.

998Articles 12(4), 28(1) of STL Statute.

999 *Ibid.*

1000 Rule 150 of STL RPE.

1001 Rule 133 (c) of STL RPE.

pseudonyms, images and voice distortion. The Defence can question anonymous witnesses *in-absentia* through the Pre-Trial Judge**1002** and a redacted transcript will be handed to the parties.**1003** No conviction can be based solely on an anonymous witness statement.**1004** The Defence has argued in the *Ayyash* Case that STL RPEs infringe on fair and public trial rights,**1005** while supporters maintain that anonymous witness testimony is a secure measure for witnesses. Further, for VCL testimony there is an allowance for effective cross-examination and confrontation with a witness as if they were present in a courtroom.**1006** International trial procedures should be responsive to more complex and challenging international environment **1007** particularly where witness are a concern, **1008** continued political, territorial and security instability.**1009** Thus as far as the measures provide time for the defence to get to know the witness and prepare, they are allowable for the sake of witness welfare.**1010**

The VWU provide for non-procedural measures such as relocation, **1011** medical, psychological, financial **1012** and accompanying support and briefing on rights and

1002Rule 93 of STL RPE.

1003 Rule 93(C) of STL RPE.

1004 Rules 159& 133 of STL RPE.

1005 *Ayyash Case,* Defense Response to Urgent Prosecution Motion for Protective Measures for Witness PRH566, STL-11-01/T/TC, 31st January, 2014.

1006*Prosecutor–v-Merhi*, Case No.STL-13-04/1/TC Decision to Hold Trial in Absentia, 20 December, 2013, paras 96, 36–59, 97–100 and 108.

1007 Damaska, M., (2012) Reflections on Fairness in International Criminal Justice, 10(3) Journal of International Criminal Justice, p.612.

1008 DeFrancia, C, (2001) Due Process in International Criminal Courts: Why Procedure Matters, 87 Virginia Law Review, p.1410.

1009 *Ayyash Case*, No.STL-11-01/1/TC, Decision to Hold Trial *In Absentia,* 1st February, 2012, paras 116 –117 on reports of the UN SG.

1010*Ayyash Case*, Reasons for Decision Denying Certification to Appeal The Decision on Protective Measures for Witness PRH 566,STL-11-01/T/TC, 19 February, 2014, paras 4-6& 24-28.

1011 Rule 50(B)(iii) of STL RPE.

1012 Rule 50(B)(i) of STL RPE.

obligations.**1013** VWU also has a duty to inform the Pre-Trial and Trial Chambers on need for immediate protective measures**1014** and any effects resulting from testimony.**1015** It is interesting to note that the STL has witness completion strategies in its cooperation agreements **1016** that enable continued security for relocated witnesses. **1017** This is something that other the Tribunals did not have **1018** attempting to achieve witness justice**1019** and an improved version compared with predecessor hybrid tribunals. Though in early stages, future protective measures will build upon the *Ayyash Case1020* jurisprudence and non-procedural measures should be developed.

3.5 CONCLUSION

It is well established that persons who give a formal statement have a duty to testify and even death threats cannot provide an excuse for not doing so.1021 Notwithstanding this, reprisal fears have deterred many would-be witnesses, particularly in organized crime trials1022 and international crimes.1023 In this context witness security becomes important1024 and an

1013 Rule 50(B)(ii) of STL RPE.

1014 Rule 50(D) of STL RPE.

1015 Article 19(B)(iii) of the Registry Regulations.

1016Tortora, G., (2010) Special Tribunal for Lebanon and Discussion of Residual Mechanisms, 104Proceedings of the Annual Meetings (American Society of International Law), pp.45-47.

1017 Korecki, L.,(2009) Procedural Tools for Ensuring Cooperation of States with the Special Tribunal for Lebanon, 7(5)Journal of International Criminal Justice, p.929.

1018 Pitman, T.W., (2011) Road to the Establishment of International Residual Mechanism for Criminal Tribunals: From Completion to Continuation, 9(4) Journal of International Criminal Justice, pp.806–817.

1019 Humphreys, M., (2011) Special Tribunal for Lebanon: Emergency Law, Trauma and Justice, 33(1) Arab Studies Quarterly, pp.4-22.

1020 *Ayyash Case*, paras 4-6, 20-28.

1021 Levin, *Op Cit*, pp.208-209.

1022 *Ibid*, p.209.

1023 Momeni, M.,(1997) Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia,41Howard Law Journal, p.155.

1024 Trotter, A., (2012) Witness Intimidation in International Trial: Balancing the Need for Protection against the Rights of the Accused, 44George Washington International Law Review, p.521.

essential element of modern criminal justice. This chapter has discussed the procedural and non-procedural protective measures1025 that help make witnesses feel secure. Originating from the common law justice system in the USA,1026 witness protective measures have expanded to other adversarial1027, inquisitorial1028 and international justice systems.1029 Procedural protective measures such as anonymous witness1030 have become an accepted mode of protective measures. Critics such as fair trial rights adherents have argued that such measures undermined the rights of accused persons. 1031 They affect proper trial preparations1032 and cross-examination.1033 Notwithstanding this, proponents of protective measures have argued that the nature of the crimes require a balanced approach1034 between the security and welfare of the witnesses on the one hand and the rights of the accused on the other.1035

1025 See generally, McDonald, G.K.,(1996) Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 7(1)Criminal Law Forum,pp.139-177.

1026 Jusufspahic, *Op. Cit,* p.268.

1027 Karsai, L.I., (2011) You Can't Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience, 79Tennessee Law Review, p.29.

1028 Peter, J,& Hilger, W.,(2000) Organised Crime Witness Protection in Germany, 58 Resource Material Series ,p.99; Vandermeersch, D.,(2005) Prosecuting International Crimes in Belgium, 3(2)Journal of International Criminal Justice,p.400; Ellison, L.,(1999) The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison, 3 International Journal of Evidence and Proof,p.29.

1029 Cogan, J.K., (2002) International Criminal Courts and Fair Trials: Difficulties and Prospects, 27Yale Journal of International Law, pp.111-140.

1030 Face and voice distortion, VLC, pseudonym; Andra, L.R,(2010) Witness Anonymity and the South African Criminal Justice System, 23(3)South African Journal of Criminal Justice,pp.351-370.

1031Scharf, M.P.,(1997) Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal, 30 New York University Journal of International Law and Policy, p.167.

1032 Leigh, M., *Op. Cit*, pp.235-238.

1033 Affolder, N., *Op. Cit*, pp.445-494.

1034 Chinkin, C.M, *Op. Cit*, pp.75-79.

1035 Heath, B. (2012) Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law, 44 George Washington International Law Review, p.321.

Psychological support, 1036 physical security, 1037 in and outside country relocation to temporal and permanent places, 1038 and change of identity 1039 are non-procedural measures employed. These have been criticised as having shortfalls such as ill-trained staff to assess1040 or provide counselling services.1041 Furthermore, it is not immediately apparent as how to deal with infiltrated witnesses.1042 The failure of agent-institution coordination within the WPP has led to some witnesses having insufficient protection. 1043 When a witness is relocated, cultural shock that follows such relocation could lead to anxiety and fear of being discovered.1044 Individual protection instead of family protection has also brought a lot of challenges on witnesses. 1045 With technological developments, international cooperation faces challenges when it comes to biometric details of witnesses under protection thus requiring attention.1046 Excessive expenses that come with operating WPP is a huge problem both at national and international level requiring commitment and dedication of governments. 1047 Notwithstanding these problems, staff training, substantial budget

1036 Demleitner, N.,*Op. Cit*, pp.662- 663.

1037 Dogarel, C .,(2012) Institutional Framework for Witness Protection, 5(1) Journal of Criminal Investigation, pp.146-153.

1038 Lynch, W., & Phillips, J.W., (1971) Organized Crime- Violence and Corruption, 20 Journal of Public Law, pp.64-66.

1039 See generally, O'Flaherty, B, & Sethi, R., (2010) Witness Intimidation, 39(2) Journal of Legal Studies, pp.399-432.

1040 Dogarel, C., *Op. Cit*, pp.146-153.

1041 Horn, *et. al*, *Op. Cit*, pp.438-439.

1042 Montanino, F., (1987) Unintended Victims of Organized Crime Witness Protection, 2(4) Criminal Justice Policy Review, pp.394-396.

1043 Hart, P.E. (2008–2009) Falling Through the Cracks: The Shortcomings of Victim and Witness Protection under 1512 of the Federal Victim and Witness Protection Act, 43 Valparaiso University Law Review, pp.771.

1044 Fyfe, N., & Sheptycki, J., *Op. Cit*, pp.339-342.

1045 Kiley, K.W., Maggio, T.M., Murphy, M.B., (1984) The Witness Protection Program: Investigating the Right to Companionship, Due Process and Pre-emption, 59Notre Dame Law Review, p.431.

1046 See generally Smith, A.D., (2005) Exploring the acceptability of Biometrics and Fingerprint Technologies, 1(4) International Journal of Service and Standards, pp.435-481.

1047 Lawson, R.J., (1992) Lying, Cheating and Stealing at Government Expense: Striking a Balance between the Public Interest and the Interests of the public in the Witness Protection Program, 24 Arizona State Law Journal, pp.1429-1431.

commitments, international cooperation, centralised coordination, full family protection, proper geographical and cultural relocation are areas that should always have continuous development in order to keep witnesses safe. Decision-making for protective measures should be inclusive1048 as witnesses have little or nothing to say on what governs them.1049 Thus, their contribution and protection helps prevent further violations and achieves respect for national and international norms.1050

From the foregoing discussion, it is suggested that the different approaches and witness protection experiences among courts1051 and tribunals became a catalyst for the future of witness protection in the ICC and international criminal justice in general. Nizich has argued that tribunal experiences had demonstrated that to a certain extent the international courts could not avoid challenges of accomplishing their mandates such as witness protection.1052 Thus, special attention had to be paid to analytical and operational processes as regards ordering and implementation of witness protective measures. Proper and clear tools for admission into the witness protection program had to be organized in order to avoid common and civil law jurisdiction experiences.1053 Further, there was need for development of agency cooperation regarding enforcement of protective measures.1054 Drawing from the tribunals' experiences, there was also need to develop and maintain international or regional cooperation for purposes of relocation and adherence to the protection of witnesses.1055

1048 McDougal, M.S., (1956) Law as a Process of Decision: A Policy-Oriented Approach to legal Study, 1 Natural Law Forum, pp.53-71.

1049 Dembour, M., & Haslam, E., (2004) Silencing Hearings? Victim–Witnesses at War Crimes Trials, 15(1) European Journal of International Law, pp.175-176.

1050 Pocar, F., (2004) The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community, 2(2) Journal of International Criminal Justice, p.596.

1051 Civil and common law jurisdictions.

1052 Nizich, I, (2000) International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal, 7 ILSA Journal of International & Comparative Law, p.362.

1053 Slate, R, N, *Op. Cit*, Criminal Justice Ethics, pp.20-34.

1054 Lawson, R.J, *Op. Cit*, 24 Arizona State Law Journal, pp.1429-1431.

1055 Wartanian, A, (2004) The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation: Lessons from the UN Tribunals Applied to the Case of Uganda, 36 Georgia Journal of International Law, p.1289.

Further, agencies handling witnesses and witnesses themselves needed to have a clear understanding of expectations from each other.1056 Such an approach was likely to maintain a conducive environment for protection and cultivation of trust between them.1057 The protection of sensitive information and confidentiality as regards witnesses in relation to due process guarantees for the defence was another experience that the ICC had to learn from both national1058 jurisdictional and international1059 tribunal practice. Specialization in use of accomplice or infiltrated,1060 incarcerated1061 or psychologically vulnerable1062 witnesses during trial and their long-term strategies for protection was a useful lesson for the ICC.1063 Further, such national jurisdictions and tribunal experiences exposed the financial

1056 Fyfe, N, & McKay, H, *Op. Cit*, Transactions of the Institute of British Geographers, pp.77-90; Fyfe, N, & Sheptycki, J, Op. Cit, European Journal of Criminology, pp.319-355.

1057 Johnson, S.T. (1998) On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia, 10 International Legal Perspectives, p.111.

1058 Comparet-Cassani, J, (2002) Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine after Alvarado, 39 San Diego Law Review, p.1165.

1059 Jurdi, N, N, (2011) Falling between the Cracks: The Special Tribunal for Lebanon's Jurisdictional Gaps as Obtacles to Achieving Justice and Public Legitimacy, 17(2) Journal of International Law and Policy, University of California, Davis, pp. 254-281

1060 Vigna, P, L, (2006) Fighting organized crime, with particular reference to mafia crimes in Italy, 4(3) Journal of International Criminal Justice , pp.522-527; Rowland, A,C. (1998) Effective Use of Informants and Accomplice Witnesses, 50 South Calorina Law Review, p.679; Acconcia, A., Immordino, G., Piccolo, S. and Rey, P. (2014) Accomplice Witnesses and Organized Crime: Theory and Evidence from Italy, 116(4) The Scandinavian Journal of Economics, pp.1116-1159.

1061 Nardini, W, J. (2006) The Prosecutor's Toolbox Investigating and Prosecuting Organized Crime in the United States, 4(3) Journal of International Criminal Justice, pp.528-538.

1062 Oosterveld, V, (2005) Gender-sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court, 12 New England Journal of International and Comparative Law, p.119.

1063 Jorda, C, (2004) The Major Hurdles and Accomplishments of the ICTY-What the ICC Can Learn from Them, 2 Journal of International Criminal Justice, p.572.

burden[1064] that comes with witness protection including protection of large families[1065] and geographical relocations.[1066]

[1064] Romano, CPR, (2005) The Price of International Justice, 4(2) Law and Practice of International Courts and Tribunals, pp.281.

[1065] Abdel-Monem, T, (2003) Foreign nationals in the United States witness security program: A remedy for every wrong, 40 American Criminal Law Review, p.1235.

[1066] Fyfe, N. R., & McKay, H. (2000). Witness intimidation, forced migration and resettlement: a British case study, 25(1) Transactions of the Institute of British Geographers, pp.77-90; Varese, F, (2006) How Mafias migrate: the case of the Ndrangheta in Northern Italy, 40(2) Law & Society Review, pp.411-444.

CHAPTER FOUR

WITNESS PROTECTION AT THE ICC. TRENDS AND PRACTICE

4.1 Introduction

The negotiators of the permanent international criminal court envisaged an omnibus objective that combined a commitment to the welfare of humans with policy considerations.1067 These would not only be essential to the future court's attainment of justice, redress and prevention, but also to the preservation, restoration and maintenance of peace within the world community.1068 It was hoped that the existence of an indispensable and effective court along with the social, political and economic support of many states,1069 would bring about conditions and outcomes of order, lawfulness, rectitude, redress, prevention, justice and peace1070 in national societies. In contrast to its predecessor international criminal tribunals, the ICC's establishment was an extension of the spirit and development of the socio-cultural identities1071 of states parties themselves, namely civil and common law jurisdictions. It is submitted that such a reflection within the ICC legal framework, was recognition of the civil and common law jurisdictions' practice that a witness before the Court had the potential of suffering from the drawback of testifying due to fear of intimidation or harm. Through international cooperation and the conduct of international criminal trials, it was hoped that these varied socio-cultural identities could have woven their value and authority within the Rome Statute in order to determine the boundaries of victims and witness security, individual behaviour, individual criminal conduct, peace, security and ideal justice for the international

1067 *See generally* Bassiouni. M.C, (1995) Establishing an International Criminal Court: Historical Survey, 149 Military Law Review, pp.49-63.

1068 *Ibid*.

1069 Bassiouni, M.C (1998) Historical Survey: 1919 -1998 in Bassiouni. M.C (Eds.) The Statute of the International Criminal Court: A Documentary History, New York, Transnational Publishers Inc, pp.1-2.

1070 Reisman, W. (1998) Stopping Wars and Making Peace: Reflections on the Ideology of Conflict Termination in Contemporary World Politics, 6 Tulane Journal of International & Comparative Law, pp.46-52.

1071 Mariniello, T. (2015) One, no one and one hundred thousand: Reflections on the Multiple identities of the ICC in Mariniello, T. (Ed) The International Criminal Court in Search of its Purpose and Identity, Oxon, Routledge, pp.1-2.

community.1072 It was aptly observed by the negotiators at Rome that for all the aspirations to be attained there was a need to safeguard witnesses who would be crucial to the process.1073 Witness protection became one of the significant factors that engaged the negotiators at Rome 1074 and according to ICC officials it continues to engage the international community.1075 It is suggested that to a greater extent the ICC officials are right because of the continuous cooperation challenges that ICC's witness protection system is facing.1076

McDougal and Reisman have argued that an analysis of current trends and practices to decision will always help the contextual examination of a problem and enable invention of alternatives for the future.1077 Pursuant to this, this chapter discusses the ICC's witness protection system, trends and practices. It firstly considers the legal and policy framework of Chambers, OTP, VWU and Defence. Secondly it analyses the challenges of ICC practice. Thirdly, and in conclusion, the chapter sums up the discussion on the ICC's witness protection system. It argues that the system has little consideration for a balancing effect on an accused person's rights to a fair trial. Further to this, there is lack of cooperation from states parties and lack of coordination among ICC organs. Such shortfalls have led to confusion within the Court and increased risks for witnesses.

4.2 Legal Framework, Practice and Challenges

1072 *Ibid*, p.2.

1073 Bassiouni, *Op. Cit*, pp.49-63.

1074 *Ibid.*

1075 ICC Official Interview N on 5 February 2015. Notes on file.

1076 Coalition for the International Criminal Court – CICC, (2015) Is Enough Being Done to Protect ICC Witnesses?, https://ciccglobaljustice.wordpress.com/2015/05/18/is-enough-being-done-to-protect-icc-witnesses/, last accessed on 5 June 2016.

1077 McDougal, M, S, Reisman, W, M, (1965) The Changing Structure of International Law: The Unchanging Theory for Inquiry, 65(5) Columbia Law Review, pp.828-830.

The witness protection regime of the ICC rests on two main foundations. Firstly, there are procedural protective measures which are put in place when witnesses adduce testimony before court. For example, when a witness faces a threat or likelihood of a threat, the party calling such a witness notifies the Registry. 1078 Final measures are ordered by the Chambers. There are also non-procedural protective measures in the form of financial costs, cooperation with states parties, relocation, delayed public broadcasts and psycho-social support mechanisms. In order to understand the original configuration and subsequent development of this legal and logistical framework, it is important to consider the negotiations, drafting and discussions during the treaty process.

4.2.1 *Travaux Préparatoires* – Protective Measures

The jurisprudence of predecessor international criminal tribunals provided a proper grounding for the establishment of protective measures for the ICC.1079 Further, experiences from civil and common law jurisdictions mirrored in the proposals of participating member states contributed significantly to the ICC protective measures negitiations. Continuous and protracted deliberations and reviews of the text on protective measures concentrated on creating a system of victim and witness protection that did not interfere with the rights of an accused person.1080 It is arguable that what concerned the delegates most were procedural measures as opposed to non-procedural measures. 1081 It is further observed that this

1078 VWU, Report (Summary) on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court (29 –30 January, 2010), p.1-2, http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf, last accessed on 16 January 2015.

1079 Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for the International Criminal Court, 2 May – 22 July, 1994, UN General Assembly (GA) Doc. No. A/49/10, 1994, 49 Session, Supp. No.10.

1080 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN General Assembly (GA) Doc. No. A/51/22, para. 181, 50 Session, Supp. No.22.

1081 Two suggestions from reading the *travaux preparatoires* might explain this: Firstly, non-procedural protective measures were not so much of a challenge during this period as the main issues were balancing the rights of an accused person and those of the witnesses; secondly, the delegates might have left the development of the non-procedural measures to the Court's operational framework and its future decision-makers. No proposals came up alluding to non-procedural measures for the future court, see Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN General Assembly (GA) Doc. No. A/51/22, para. 181, 50 Session, Supp. No.22; Report of the Preparatory Committee on the Establishment of an

inadvertent oversight was later to become one of the most serious shortcomings of the ICC, leading to the collapse of some 1082 trials. The negotiators aimed to ensure that the provisions were both comprehensive and precisely formulated.1083 There were suggestions that a complete distinction should be made between the protection of victims and witnesses on the one hand and the protection of the accused and her or his witnesses. 1084 It is noteworthy that there was no exhaustive discussion as regards a clear difference between the protection of victims and the protection of witnesses. Some delegates were unsure as to whether during investigations, protective measures should include all victims or only victims who were witnesses.1085 Further, it was difficult to agree on the institutional location of the Victims and Witnesses Unit (VWU). 1086 Some delegates proposed the OTP, while the Dutch and Australian delegations pressed for it to be within the Registry.1087 Premising it within the registry would promote neutrality and centralise administration of the protective

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International Criminal Court, Volume 1 (Proceedings of the Preparatory Committee During March- April and August 1996), UN General Assembly (GA) Doc. No. A/51/22, 51 Session, Supp. No. 22, paras 280–282, http://documents-dds-nv.un.org/doc/UNDOC/LTD/N96/217/43/pdt7N9621743.pdf7QpenElement , last accessed on 03 January 2015.

1082 Esterik, L, (2014) The Challenges of the Kenyan Cases at the International Criminal Court, American NGO Coalition for the International Criminal Court, http://www.amicc.org/docs/The%20Kenya%20Cases%20at%20the%20International%20Criminal%20Court.pdf , last accessed on 11 February 2015.

1083 A/51/22 Vol. I. (Proceedings of the Preparatory Committee during March-April and August 1996), para 280, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/239/27/pdf/N9623927.pdf7QpenElement , last accessed on 07 January 2015.

1084 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1 (Proceedings of the Preparatory Committee During March- April and August 1996), UN General Assembly (GA) Doc. No. A/51/22, 51 Session, Supp. No. 22, paras 280 – 282, http://documents-dds-nv.un.org/doc/UNDOC/LTD/N96/217/43/pdt7N9621743.pdf7QpenElement, last accessed on 03 January 2015.

1085 Canadian Proposal (Revision), A/CONF.183/ C.l/WGPM/L.58/Rev.l. 6 July 1998, http://documents-dds-ny.un.org/doc/UNDOC/LTD/G98/717/27/pdf/G9871727.pdf7QpenElemerit, last accessed on 09 January 2015.

1086 *Ibid*, para 281; Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN. Doc. A/CONF.183/2/Add.1, page 70,

http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/101/05/PDF/N9810105.pdf?OpenElement, last accessed on 17 November 2014.

1087 Draft Set of Rules of Procedure and Evidence for the International Criminal Court, Working Paper Submitted by Australian and the Netherlands 22, 26 July, 1996, Doc. No. A/AC.249/L.2, http://www.iccnow.org/documents/DraftSetRulesofProcedure.pdf, last accessed on 03 January 2015, http://documents-dds-ny.un.org/doc/UNDOC/LTD/N96/191/03/pdf/N9619103.pdf?OpenElement, last accessed on 03 March 2015.

measures. On the contrary, there would be a likelihood of delays in responding to urgent requests from the OTP and defence for protective measures. The delegates were not at cross-purposes, however, as regards the need for a duty and responsibility to protect victims and witnesses bestowed on the whole court and not just one unit or organ.[1088] Protective measures in the form of closed proceedings or electronic evidence presentation[1089] were to be ordered by the Chamber.[1090] This would only be achieved if states parties cooperated with the court.[1091] The relationship between witness protection and cooperation would later come back to haunt the court a few decades later.

It is suggested that the issue of cooperation and witness protection was glossed over probably due to the false assumption that no states parties which had duly ratified or acceded to the Rome Statute would fail to cooperate with the court while remaining party to the treaty.[1092] By 1997 proposals for procedural protective measures still emphasized the need for consistency with the rights of the accused person. Such considerations included cross-examination of prosecution witnesses[1093] and the need to take into account views and

1088 New Zealand Working Paper on Article 43, Non-Paper/WG.4/No. 19/ Rev. 1, 13 August, 1997, http://www.genderjurisprudence.org/documents/icc/ICC_-_Situation,_Jdgmts,_Indmts_&_Docs/DRC/Cases/Lubanga/Submissions/Victims/2007-12-07,_Lubanga_OPCV's_Analysis_of_notions_of_Victims_An.pdf , last accessed on 11 February 2015.

1089 Proposal by Argentina & Canada, Document Number A/AC.249/WP.16, 20th August, 1996, http://www.genderjurisprudence.org/documents/icc/ICC_-_Situation,_Jdgmts,_Indmts_&_Docs/DRC/Cases/Lubanga/Submissions/Victims/2007-12-07,_Lubanga_OPCV's_Analysis_of_notions_of_Victims_An.pdf , last accessed on 11 February 2015.

1090 France Working Paper, No. A/AC.249/L.3, 6 August, 1996, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/198/65/img/N9619865.pdf7QpenElement , last accessed on 03 January 2015.

1091 Egyptian Proposal, Document No. No. A/AC.249/WP.11, 19 August, 1996.

1092 ICC Official L interview on 2d February 2015. Notes on file; from the perspective of international law, its application hinges on the consent of States, whether express or implied. Once a State assumes a treaty commitment, it is bound by that commitment. Further, the uncontroversial principle reflected in Article 27 of the Vienna Convention on the Law of Treaties provides that a State may not invoke the provisions of its domestic law as justification for its failure to perform a treaty.

1093 Preparatory Committee, Compilation of Proposals, Non-Paper, WG. 4/IP, 4 August, 1997, in A/51/22 Vol. II (Compilation of proposals),

http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/239/45/img/N9623945.pdf7QpenElement, last accessed on 06 January 2015.

concerns relating to witnesses' personal interests. 1094 It was proposed that during investigations, primary consideration of the witness' circumstances should include human characteristics such age, gender, health, nature of crime, 1095 privacy, integrity and security. 1096 Furthermore, there should be mandatory *in-camera* proceedings for the testimony of minors.1097 Such protective measures, it was proposed, could extend to family members. 1098 By this stage there was even agreement that the state could make an application for necessary measures to be taken to safeguard servants or agents and protect sensitive information.1099 It is suggested that though these proposals represented a genuine attempt to improve the security of witnesses and their testimony, less attention was paid towards how far these measures would impinge not only on the rights of an accused person but also on the integrity and process of the trials.

1094 Preparatory Committee, Revised Abbreviated Compilation, A/AC.249/1997/CRP.9, 14 August, 1997, http://documents-dds-ny.un.org/docAJNDOC/LTD/N97/224/74/pdf/N9722474.pdf7QpenElement,last accessed on 06 January 2015.

1095 Canadian Proposal, Non-Paper/WG. 4/No. 15, 13 August, 1997, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/239/45/img/N9623945.pdf7QpenElement , last accessed on 06 January 2015.

1096 New Zealand Amended Proposal, Non-Paper/WG.4/No. 19/Rev.1, 13 August, 1997, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/239/45/img/N9623945.pdf7QpenElement , last accessed on 06 January 2015.

1097 Preparatory Committee, Report of the Intersessional Meeting in Zutphen – The Netherlands, A/AC.249/1998/L.13. 4 February 1998,

http://documents-dds-ny.un.ore/doc/UNDQC/LTD/N98/025/28/pdf/N9802528.pdf70penElement, last accessed on 06 January 2015.

1098 New Zealand Proposal, Non-Paper/WG.4/No. 19, 13 August, 1997, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/239/45/img/N9623945.pdf7QpenElement, last accessed on 06 January 2015.

1099 Decision, Preparatory Committee at its Session held on 4 to 15 August, 1997, A/AC.249/1997/L.8/Rev.1, 14 August, 1997, http://documents-dds-ny.un.org/docAJNDOC/LTD/N97/224/74/pdf/N9722474.pdf7QpenElement , last accessed on 06 January 2015.

By 1998 the consensus was for the VWU to be located within the Registry.1100 The Report of the Preparatory Committee on the Establishment of an International Criminal Court (ICC)1101 initially set out the witness protection provisions in Article 44(4), providing that: '*The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide counselling and other assistance to victims, defence witnesses, their family members and others at risk on account of testimony given by such witnesses and shall advise the organs of the Court on appropriate measures of protection and other matters affecting the rights and the well-being of such persons. The unit shall include staff with expertise in trauma, including related to crimes of sexual violence.'*1102

Article 44 later became Article 43 of the Rome Statute.1103 With regard to the question of appropriate protective measures,1104 it was the proposal of the Congo and Niger delegates that the VWU should never act in isolation.1105 The VWU should act in accordance with the

1100 Preparatory Committee, Report of the Working Group on the Composition and Administration of the Court, A/AC.249/1998/L.14/Add.l. 31 March 1998, http://documents-dds-ny.un.org/doc/UNDQC/LTD/N98/089/51/pdf/N9808951.pdf70penElement , last accessed on 08 January 2015; Preparatory Committee, Draft Statute of the ICC, A/AC.249/1998/CRP.10.1 April 1998, Article 37; Recommendations of the Coordinator of the Committee, A/CONF.183/C.1/L.45. 4 July 1998, http://doctjments-dds-ny.un.org/doc/UNDOC/LTD/G98.71.175.pdf?OpenElement, last accessed on 09 January 2015.

1101 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Document A/AC.249/1998/DP.6.

1102 UN Diplomatic Conference of the Plenipotentiaries on the Establishment of an ICC, Coordinators for Text on Articles 43 and 44, Doc. UN. A/CONF.183/C.1/L.36. 30 June, 1998, http://documents-dds-ny.un.org/doc/UNDQC/LTD/G98/707/77/pdf/G9870777.pdf70penElemerit ,last accessed on 09 January 2015.

1103 Rome Statute of the International Criminal Court, A/CONF. 183/9, 17 July, 1998.

1104 Report of the Working Group on Procedural Matters, A/CONF.183/C.l/WGPM/L.2/Add.6.11 July 1998, http://documents-dds-ny.un.org/doc/UNDOC/LTD/G98/719/82/pdf/G9871982.pdf7QpenElement, last accessed on 09 January 2015; see also Report of Working Group on Procedural Matters, A/CONF.183/C.l/WGPM/L.2/Add.8. 15 July 1998, Article 68,

http://documents-dds-ny.tm.org/dQc/UNIXX:/LTO/G98/723/73/pdf/G9872373.pdf70penElement, last accessed on 09 January 2015.

1105 Republic of Congo and Niger Proposal, A/CONF.183/C.1/L.43 - 3 July 1998, http://documents-dds-nv.un.org/doc/UNDOC/l,TD/G98/710/53/pdf/G9871053.pdf?Open , last accessed on 09 January 2015.

proposed Article 68 protective measures principles 1106 and in consultation with the OTP.1107 It is rather curious that the delegates did not see fit to propose consultations with the defence as well. It is suggested that, from the Rome discussions, witness protection was wrongly viewed as a concern for only the OTP and not the defence. As a result, the negotiations did not promote the equality of arms.1108 Such assumptions were confirmed by ICC officials that the negotiations prioritized respect for OTP witnesses over defence witnesses.1109 The OTP witnesses were in this sense regarded as beyond reproach. As will be discussed later in this chapter, this ambiguity was probably a recipe for disaster and misunderstanding later, regarding which organ should take the leading role in the provision of services to witnesses before the court. Eikel has argued that the treaty interpretation and practice seems to indicate that the Rome Statute and the ICC's Rules of Procedure and Evidence (RPE) provide for split responsibilities for protection measures amongst the different organs of the court but they nevertheless fail to adequately define the precise boundaries of these responsibilities.1110

It is suggested that the Rome deliberations and draft law seemed to point to the fact that there was merely general attention towards witness protection without actually addressing specific witness needs. Thus it is argued here that wrong lessons had been learnt from the jurisprudence and practice of the predecessor international criminal tribunals. A potential repeat of the ICTR failings, such as sacrificing the defence witnesses' needs for prosecution

1106 Canadian Proposal, A/CONF.183/C.1/WGPM/L.58. 6 July, 1998, http://documents-dds-nv.un.org/doc/UNDOC/LTD/G98/713/73/pdf/G9871373.pdf7QperiFlempnt , last accessed on 09 January 2015.

1107 Draft Statute for the ICC, Compendium of Draft Articles Referred to the Drafting Committee by the Committee of the Whole as of 9 July, 1998, Doc. A/CONF.183/C.1/L.58. 9 July 1998, http://documents-dds-ny.un.org/doc/UNDOC/LTD/G98/716/97/pdf/G9871697.pdf7QpenElement , last accessed on 09 January 2015.

1108 Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN. Doc. A/CONF.183/2/Add.1, page 70,

http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/101/05/PDF/N9810105.pdf?OpenElement, last accessed on 17 November 2014.

1109 ICC Official J interview on 1 February 2015. Notes on file.

1110 *See generally,* Eikel, M., 23 Criminal Law Forum, pp.97-133.

witnesses, was likely to recur.1111 There was no proper attention to detail as regards the requirements of defence witnesses. Overall, the mechanism for witness protection merely mentioned the protection of the accused person during trial without proper guarantees for his or her witnesses.1112 Thus it is not surprising that some ICC defence team officials have at times made allegations that the court is biased towards the OTP.1113 It is argued in this chapter that such differential treatment probably emanates from the legal framework of the Rome Statute and the ICC' RPE. The decision-makers at the ICC have merely tried to express and implement the values that the Rome negotiators embodied into standards for them to follow.

4.2.2 Procedural Protective Measures

The legal framework of the ICC differs from that of its predecessor *ad hoc* tribunals in that the duty to protect witnesses is allocated to the ICC's different sections. This split responsibility centres on the OTP, Registry (VWU), the Defence and the Chambers. Contrary to predecessor tribunals, the presence of split responsibility within the Rome Statute demonstrates the special place and attention put on the protection of witnesses.1114 It is suggested that this represents a division of labour aimed at effectiveness of the protective measures among the organs. However, as the discussion below will demonstrate, this split responsibility approach has its own flaws as well.1115 In Chapter 5 above it was suggested that the introduction of some safeguards could help ensure consistency. 1116 Some scholars1117 have summed up the ICC's procedural protective measures as revolving around

1111Obote-Odora, A., (2005-2006) Rape and Sexual Violence in International Law: ICTR Contribution, 12 New England Journal of International and Comparative Law, p.145.

1112 Preparatory Committee, Draft Statute of the ICC, A/AC.249/1998/CRP.12.1 April 1998, Article 61; see also Article 44, Report on the Preparatory Committee on the Establishment of the ICC, A/CONF.183/2/Add.l. 14 April 1998, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/101/05/pdf/N9810105.pdf70penElement, last accessed on 08 January 2015.

1113 ICC Official J & K interviews on 1 February 2015. Notes on file.

1114 Eikel, M, Criminal Law Forum, *Op. Cit*, p.101.

1115 Lack of coordination among the organs is one of the main ones.

1116 Chapter 5, section 5.2.2.

1117 McLaughlin, C., *Op. Cit*, p.190.

six main principles namely: (i) *non-disclosure of identity* on pre-trial disclosure;1118 (ii) *protection from media and public photography, video and sketch*;1119 (iii) *protection from confrontation with the accused* such as use of pseudonym;1120 (iv) *anonymity* from general interpretation of witnesses and victims protection;1121 (v) *reparations to victims;*1122 and (vi) *protection of victims and witnesses*1123 of sexual assault and violence through the provision of in-camera or closed session proceedings,1124 alongside training requirements for VWU staff in handling sexual violence trauma.1125

These procedural protective measures are aimed at ameliorating the position of vulnerable witnesses and victims. From the initial decision-making on investigations, the OTP as both participant and decision-maker, is required to take high regard and cognizance of the interests and personal circumstances of the witnesses.1126 Time lapses can lead to the likelihood of witness intimidation, loss of interest, less reliability and even death.1127 Delays in contacting witnesses can lead to very grave consequences.1128 Notwithstanding this, if the witness' environment is not very safe, the OTP will usually encourage the witness to relocate to a safer environment or not contact such a witness at all.1129 Therefore, as early as possible, the OTP needs to move swiftly and exercise extreme caution during interviews with witnesses

1118 ICC RPE Rule 76(4).

1119 ICC RPE Rule 87(3).

1120 ICC RPE Rule 87(3) (d).

1121 Articles 64(6) (e) and 68(1) of the Rome Statute.

1122 Article 75 of the Rome Statute.

1123 Mandating Chambers to order special protective measures for elderly persons, children, traumatised victims and witnesses, sexual violence victims and witnesses.

1124 Article 68(1) & (2) of the Rome Statute.

1125 Article 43(6) of the Rome Statute.

1126 Article 54(1) (b) of the Rome Statute.

1127 Whiting, A., *Op. Cit*, p.182.

1128 *Ibid.*

1129 *Ibid.*

that voluntarily come forward.1130 The witnesses' mere voluntariness and contact with the court is likely to be considered a threat by those implicated by their evidence. The negotiators at Rome allocated witness protection powers to the court, thus it is only logical and within the expressed objectives of the Rome Statute that they should be protected. It is argued here that by drafting the Rome Statute in this way, the international community intended to establish humanitarian protection in the form of age, gender, well-being or health-specific measures in respect of certain crimes such as those involving sexual violence, gender violence and violence against children.1131 In aspiring to these humanitarian objectives it was considered that most victims and witnesses are likely to be women and children1132 and proposals were made for a targeted policy recruitment of female staff for the purposes of sexual violence and rape cases.1133 According to ICC officials, the court has appointed qualified psychologists attached to the Gender and Children Unit, specifically to deal with vulnerable witnesses.1134 It is suggested that such an arrangement rightly promotes one of the court's aspirations as a 'site for gender justice' for such vulnerable witnesses. 1135 The use of video-link technologies1136 and the provision of support persons who assist the witness through judicial proceedings1137 and closed sessions have become the backbone1138 of a set of stringent procedural protective measures for the court. As will be discussed later in this chapter, these procedural measures have become entrenched at the ICC. An ICC official confirms that despite the numerous challenges that these measures have brought for both the accused person and the Court process itself, protective measures have become part of the trial

1130 IBA, *Op. Cit*, p.15.

1131 Whiting, A, *Op. Cit*, p.182.

1132 VOA (2015) UN Says Women, Children Are Biggest Victims of War, http://www.voanews.com/content/a-13-2009-03-08-voa9-68678402/408727.html, last accessed on 11 January 2015.

1133 Informal Compilation of Proposals by Working Group on the Composition and Administration of the Court, UN Doc. A/AC.249/CRP.11, 27 August, 1996.

1134 ICC Official N interview on 5 February, 2015. Notes on file.

1135 Chappell, L, Durbach, A, (2014) The International Criminal Court: A SITE OF GENDER JUSTICE? 16(4) International Feminist Journal of Politics, pp.533-537.

1136 Rule 87(3) of the ICC RPE.

1137 Rule 17(3) of the ICC RPE.

1138 ICC Official I interview on 14 November, 2014. Notes on file.

practice.1139 These reflect the ICC's quest to psychologically protect the most vulnerable through reducing the stress and trauma that comes with courtroom testimony.1140

1. The Office of the Prosecutor

As an organ of the court and custodian of prosecutorial process, the OTP has a crucial role to play regarding the safeguarding of witnesses' welfare. To that end, at the disclosure stage, the OTP is under an obligation to withhold evidence only if such evidence may lead to a severe risk of danger to a witness or to his or her family.1141 It is suggested that this procedure undermines the human rights of the defendant. Some scholars have argued that in comparison to international human rights standards, such procedure does not meet the threshold for a fair trial. 1142 Although the negotiations at Rome envisaged a pragmatic approach to trial procedure that would not prejudice an accused person, by guaranteeing him or her sufficient time for trial preparation,1143 legal interpretation and decision-making has moved in the opposite direction. 1144 It is not an appropriate balance to sufficiently compensate the handicaps of the defence. 1145 A right to sufficient time to prepare for trial has been abrogated in the name of protective measures for the witnesses 1146 thereby materially

1139 ICC Officials J & K interviews on 1 February, 2015. Notes on file.

1140 Beresford, S. (2005) Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable? 3(3) Journal of International Criminal Justice, p.723.

1141 Article 68(5) of the Rome Statute.

1142 Beqiri, R., (2011) Witness Protection in International Criminal Court, Masters Thesis, Lund University, p.20, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2167029&fileOId=2171585, last accessed on 17 December 2014.

1143 Preparatory Committee of the International Criminal Court, Informal Working Group Document, A/AC.249/CRP.14, 27 August, 1996.

1144 *Prosecutor –v- Katanga & Ngudjolo* (Judgment on the Appeal of the Prosecution Against the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 67 of the Rules of the Pre-Trial Chamber I), per Dissenting Opinion of the Judge Georghis Pikis and Judge Nsereko, Case No. ICC-01/04-01/07-776, 26 November, 2008, *para* 15.

1145 OSCE & DIHR, Legal Digest of International Fair Trial Rights, *Op. Cit*, p.172.

1146 ICC Official K interview on 1 February, 2015. Notes on file.

affecting the principles of fairness1147 and equality1148 in the trial process. Concepts of fairness and equality of arms are imperative to the credibility of international criminal justice.1149 The ICC is under a duty to apply and interpret law in the way "consistent with internationally recognized human rights."1150 Article 21(3) thereby makes internationally recognized human rights norms directly applicable within the ICC system. Groulx has argued that only observation of human rights and rule of law can enable fairness of any trial process.1151 From a human rights perspective, the principle of equality of arms means that the procedural conditions at trial and sentencing must be the same for all parties.1152 It calls for a "fair balance" between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.1153 The principle is an inherent aspect of the right to a fair trial and intimately linked to the principle of equality before courts and tribunals.1154

The contradiction between competing choices of witness protection and fair trial rights needs a proper resolution which can implement the policy considerations envisaged at Rome. Such

1147 Article 64 (2) of the Rome Statute.

1148 Article 67 (1) of the Rome Statute.

1149 Buzarovska, G, (2015) Interpretation of " Equality of Arms" In Jurisprudence of AD Hoc Tribunals and ICC, 11(1) South East European University Review, pp.28-39.

1150 Article 21(3) of the Rome Statute.

1151 Groulx, E, (2006) "Equality of Arms": Challenges confronting the legal profession in the emerging international criminal justice, 3 Oxford University Comparative Law Forum, p.2; Buzararovska, G, (2015) Interpretation of "Equality of Arms" in Jurisprudence of Ad Hoc Tribunals and ICC, 11(1) South East European Review, pp.28-29.

1152 OSCE & DIHR, Legal Digest of International Fair Trial Rights, *Op. Cit*, p.110.

1153 *Werner v Austria* [1997] ECHR 92, para 63; *Coëme and Others v Belgium* [2000] ECHR 250, para 102; *G. B. v France* [2001] ECHR 564, para 58.

1154 OSCE & DIHR, Legal Digest of International Fair Trial Rights, *Op. Cit*, p.110; The notion of equality is referred to in this broader context within Article 14(1) of the ICCPR, and also within the specific context of criminal proceedings in the chapeaux to Article 14(3) of the ICCPR, in terms of the enjoyment of fair trial rights "in full equality", see also article 10 of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, also guarantees that: "Everyone is entitled in full equality to a fair and public hearing… in the determination of his rights and obligations and of any criminal charge against him."

considerations and approach will enable the ICC to reach a rational solution1155 that is not only fair1156 but also effective.1157 It is further suggested that such a rational outcome must reflect the policy contemplations of a court with criminal procedural aspects that are unique in nature and are a blend of different legal traditions.1158 When it comes to protective measures, OTP powers are not confined to withholding disclosure. It is responsible for making requests to the Chamber for necessary measures that will ensure that witnesses are accorded full protection.1159 Such requests follow from the findings of the Biographic Security Questionnaires (BSQs) 1160 and Individual Risk Assessments (IRAs) 1161 administered by the OTP during investigations.1162 Though understood to be independent and entrusted with the protection of its own witnesses,1163 the same statute accords the VWU responsibility for witness protection and coordination.1164 Between the two organs exists a partial organizational or administrative arrangement for coordination.1165 Thus at times this arrangement has resulted in the OTP making unilateral preventive relocation arrangements which have been disputed by the VWU and led to serious legal challenges before the Chambers.1166 This was very common during the early stages of the Court's

1155Suzuki, K., (1974) *Op. Cit*, 1 Yale Studies of World Public Order, p.1.

1156 Ambos, K. (2003) International Criminal Procedure 'Adversarial' 'Inquisitorial' or 'Mixed', 3 International Criminal Law Review (ICLR), pp.2-5.

1157 Caianiello, M. (2011) First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models, 9(2) Journal of International Criminal Justice, p.386.

1158 Bensouda, F. (2010-2011) The ICC Statute – An Insider's Perspective on a Sui Generis System for Global Justice, 36 North Carolina Journal of International Law and Commercial Regulation, p.279.

1159 Article 54(3) (f) of the Rome Statute.

1160 A form that assesses the history and bio-data of the prospective witness. It is administered during investigations.

1161 Assessment of the individual circumstances of the witness such as family, security threats (if any), proximity to the accused person.

1162 ICC Official N interview on 5 February 2015. Notes on file.

1163 Article 42(2) of the Rome Statute.

1164 Article 43(6) of the Rome Statute.

1165 Article 42(2) of the Rome Statute.

1166 *Prosecutor –v- Katanga & Ngudjolo* (Judgment on the Appeal of the Prosecution Against the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of

practice. According to ICC official, the relations seem to have improved for the better.1167 Despite the official's claims, it is suggested that the dissenting opinions arising from relevant decisions demonstrate the controversy that still surrounds the question of responsibility for protective measures amongst the court organs. Probably it also relates to the failure of trust obtaining between some of the organs.1168 Further, this mistrust is a constant negative1169 clearly demonstrating a lack of appreciation and awareness among institutional officers as to the need for constructive internal communication and consultation. On the one hand it is the duty of the VWU to take the lead1170 and on the other it is the OTP that has a mandatory duty to take measures that protect its witnesses without being subordinate to any other court organ.1171 It has been argued that such powers need to be exercised in an impartial and objective manner.1172 It is therefore not a blank cheque for the OTP to possess coercive powers that will persuade a witness to testify in its favour in exchange for protection. It is suggested that these are powers that have to be exercised with caution in order to ensure the integrity of protective measures. Subordination is likely to be frustrating as not all requests made through VWU can achieve the desired results. Further delayed decision-making on the part of VWU only results in frustrating both the OTP and witnesses who at that moment need urgent help.1173

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the Statute and Rule 67 of the Rules of the Pre-Trail Chamber I), per Dissenting Opinion of the Judge Georghis Pikis and Judge Nsereko, Case No. ICC-01/04-01/07-776, 26 November, 2008, *para* 15.

1167 ICC Official N interview on 5 February 2015. Notes on file.

1168 Former ICC Official M interview on 4 February 2015. Notes on file.

1169 ICC Registrar interview, http://www.ijmonitor.org/2014/07/icc-registrar-discusses-restructuring-and-need-for-larger-budget/, last accessed on 12 February 2015.

1170 *Prosecutor –v- Katanga & Ngudjolo, Op. Cit,* Dissenting Opinion of the Judge Georghis Pikis and Judge Nsereko, Case No. ICC-01/04-01/07-776, 26 November, 2008, *para* 15.

1171 *Ibid.*

1172 Eikel, *Op. Cit,* p.104.

1173 ICC Official N interview on 5 February 2015. Notes on file.

It is said by ICC officials that both the OTP and VWU are organs that have the same intention to protect witnesses. 1174 In agreement, this thesis suggests that the OTP and VWU only have varied mandates, varied levels of operations and mechanisms but aimed at one goal of protecting witnesses While the Appeals Chambers has held that pursuant to Article 43(6) of the Rome Statute, the VWU is the one entrusted with responsibility for advice and actual provision for protective measures and security arrangements,1175 some opponents of this view have dissented that it is not within the purview of the VWU to make provision for protective and security measures.1176 The Rome Statute grants the VWU only an advisory1177 and not a decision-making authority. Thus according to this argument, from the negotiating stage of the Rome Statute, the framers did not intend to grant the VWU powers to order, issue or enforce such protective measures.1178 It has been suggested that, contrary to a word for word approach of interpreting the intention of the Rome Statute framers, there is need for a thematic approach to the understanding of what actually transpired at Rome.1179 This should be extracted from the informal meetings, groupings of like-minded states, and customary international law at the time of the signing of the treaty. 1180 It is suggested that the prevailing chaotic and differential conceptualization, understanding and interpretation of the organs' responsibilities only puts the witnesses in a very precarious situation. These chaotic circumstances breed mistrust and are not helpful to the witnesses. 1181 Further, this differential understanding of lead responsibility and

1174 Former ICC Official Interview M on 4 February 2015. Notes on File.

1175 *Prosecutor –v- Katanga & Ngudjolo* (Judgment on the Appeal of the Prosecution Against the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 67 of the Rules of the Pre-Trial Chamber I), para 89.

1176 *Ibid*, Dissenting Opinion, *para*s 14–22.

1177 *Ibid*.

1178 Tolbert, D., (2008) Article 43 in Triffterer, O. (Ed.) Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article, Munchen, Hart, p.989.

1179 Jia, B.B (2010) Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article, 9(1) Chinese Journal of International Law, p.261.

1180*Ibid.*

1181 Berkeley Report, *Op. Cit*, p.13.

power1182 struggles for protective measures only erodes the respect1183 that the OTP and VWU have for each other. It is thus submitted that the framers of the Rome Statute intended a concerted effort towards the achievement of the public good and the amelioration of witnesses' circumstances. Thus decision-making should reflect the human welfare or agency,1184 values and goals that law should vindicate1185 as opposed to strict adherence to unhelpful procedures and interpretations. Both institutions need a concerted and constructive coordination to engage in the court's global affairs1186 such as witness protection. The fact that the OTP has stopped the unilaterally practice of preventive relocation1187 does not mean that the different understandings have been resolved. According to some former ICC officials observing the court's practice, they are still there.1188 It is suggested that litigation in the *Katanga Case* and the subsequent decision by the OTP to proceed with the case and to drop the preventive relocation disagreements was probably a decision made for the sake of progress with the case.

(b) The Chambers

The Chamber is another organ of the ICC that the negotiators at Rome entrusted with powers to order appropriate protective measures for any person who is at risk as a result of his or her

1182 Hathaway, O. (2005) Between Power and Principle: An Integrated Theory of International Law, 72 University of Chicago Law Review, p.469.

1183 McDougal, M, & Lasswell, H. (1971) Criteria for Theory About the Law, 44 Southern California Law Review, pp.387-388.

1184 Hathaway, O. (2007) The Continuing Influence of the New Haven School, 32 Yale Journal of International Law, p.558.

1185 Land, M. (2013-2014) Reflections on the New Haven School, 58 New York Law School Law Review, p.919.

1186 Sloathe, R, (2009) More than What Courts Do: Jurisprudence, Decision and Dignity – In Brief Encounters with Global Affairs, 34 Yale Journal of International Law, pp.517-524.

1187 Eikel, *Op. Cit*, p.117.

1188 Former ICC Official M interview on 4 February 2015. Notes on file.

interaction with the court.1189 It is suggested here that the Chamber acts as a check on the OTP's decisions through confirmation and reviews. The VWU is able to have a say in this checking function by submitting its assessment reports to the Chambers.1190 Further, it has the responsibility of taking suitable measures1191 that will preserve the safety, physical and psychological well-being, dignity and privacy of witnesses and victims. It has the responsibility of making sure that IRAs are presented before the Court by the OTP and a decision is made as what sort of protective measures or the level thereof would apply to such a witness.1192 One of the most used measures is the conduct of closed sessions pursuant to Regulation 20 of the Court. In order for a closed session to take place, it must be justified with public reasons.1193 This is so because hearings are usually held in public1194 and the Chambers need to show cause as to why there should be a deviation from this principle. In doing so, consideration must be given to *inter alia*, age, health, gender of those involved as well as the types of crimes committed, be it sexual violence or gender violence and crimes against children.1195 Thus the Trial Chamber (TC) is at liberty to derogate from the principle of public hearings and conduct hearings in closed sessions or permit electronic evidence in the interests of the security, well-being, dignity and privacy of a witness.1196

Notwithstanding this, it is argued that there is considerable confusion as regards the conflation of law and policy. The current interpretation of what 'appropriate measures'

1189 *Prosecutor –v- Katanga*, Case No. ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 13 May, 2008, *para*. 44.

1190 *Ibid.*

1191 Article 68 of the Rome Statute.

1192 ICC Official N Interview on 5 February 2015. Notes on file.

1193 Regulation 20 of the Court.

1194 *Prosecutor –v- Josephy Kony, Vincent Otti, Okot Odhjambo, Raska Lukwiya, Dominic Ongwen*, Decision on 'Prosecutor's Application to attend 12 February hearing', 9 February, 2007, Case No. ICC-02/04-01/05-155, http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-02-04-01-05155_English%20Decision,%209%20February%202007.pdf last accessed on 13 January 2015.

1195 Article 68(1) of the Rome Statute.

1196 Articles 69(1) and 68(2) of the Rome Statute.

amount to infringes the very policy and requirement of safeguarding human rights entitlements for perpetrators of the most heinous crimes.[1197] In agreement with ICC official,[1198] it is the duty of the defence lawyer to see to it that such closed session processes are within the ambit of the court's legal framework. Contrary to the views of some defence lawyers at the ICC that it would have been better for the statute and rules to be different,[1199] it is submitted that the problem is with the interpretation and rules regulating closed sessions rather than the Statute itself. Furthermore, instead of unquestioning acceptance of the Statute,[1200] it must be acknowledged that the ICC and ICL are products of an ongoing constitutive process. In simple terms, it is work in progress[1201] which is not perfect and that in affirmation of the ICC official's position,[1202] is necessarily part of the international legal order to jointly work towards its betterment. Notwithstanding closed sessions being an affront to the reputation, promotion of justice and transparency at the ICC,[1203] it is suggested that the very nature and spirit enshrined within the Rome Statute demands an implementation of public trial for the accused as well as the right to be present at trial, right to equality of arms and right to call and examine witnesses. Such universal human benefits cannot be attained if trial strategies, trial processes and outcomes do not secure the safety of a witness. Thus safety and protection is one guarantee for due process, trial conclusion and positive contribution towards an end to impunity. Therefore, it is suggested that closed sessions are a necessary and appropriate balance, only if they reflect fair processes and fair decision-making by the Chambers. Even though the physical appearance of a witness and observation of his or her demeanour would have been the best evidence before the Chambers,[1204] an opportunity to

1197 Lee, R.S (2001) An Assessment of the ICC Statute, 25 Fordham International Law Journal, p.758.

1198 ICC official J interview on 1 February, 2015. Notes on file.

1199 *Ibid.*

1200 *Ibid.*

1201 ICC Official J interviewed on 1 February 2015. Notes on file.

1202 ICC Official K interviewed on 1 February 2015. Notes on file.

1203 Ghollasi, M., (2014) Witness Protection in Terms of a Fair Trial in Criminal Matters, 3(9) Journal of Novel Applied Sciences, pp.1048-1050.

1204 ICC Official K interviewed on 1 February 2015. Notes on file.

exercise the right to cross-examination of a witness is a balancing factor1205 according some sense of dignity on the accused person. This is based on a purposive interpretation of the Rome Statute which respects the intentions that the world community expressed at Rome. Any further disagreements as to the specific character which the examination can take, should be dealt with procedurally before the court.1206

As argued earlier,1207 disclosure violations (for example, incomplete or late disclosure)1208 based on the pretext of confidentiality or the protection of victims and witnesses have been a cause of concern,1209 particularly for the defence as highlighted by some ICC officials.1210 It is suggested that there are no clear resources1211 or bases of power1212 for the OTP and the Chambers to legitimate such violations. These violations have been justified because of security concerns for witnesses pursuant to Article 54(3) (e) and (f) of the Rome Statute1213 and the Chambers have duly embraced them, leading to serious redactions.1214 It is thus suggested that, in view of the Chamber's role as both actor and participant in decision-

1205 Moffett, L. (2014) Justice for the Victims before the International Criminal Court, Oxon, Routledge, p.133.

1206 ICC Official K interview on 1 February 2015. Notes on file.

1207 See section 4.2 of this Chapter.

1208 Pursuant to Rules 76 to 84 of the ICC RPE.

1209 Ambos, K. (2012) The First Judgment of the International Criminal Court (*Prosecutor –v- Lubanga*): A Comprehensive Analysis of the Legal issues, 12 International Criminal Law Review, pp.124-126.

1210 ICC Official J & K interviews on 1 February 2015. Notes on file.

1211 Reisman, M, W, (1992) The View from the New Haven School of International Law, 86 Proceedings of the Annual Meeting (American Society of International Law), p.122.

1212 Reisman, M.W (1981) International Lawmaking: A Process of Communication: The Harold D. Lasswell Lecture, 75 Proceedings of the Annual Meeting (American Society of International Law), pp.101–120.

1213 *Prosecutor –v- Lubanga Dyilo*, Case No. ICC-01/04-01/06-1401, Decision on the Consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June, 2008, paras 63 – 69 (June 13, 2008), http://www.icc-cpi.int/iccdocs/doc/doc511249.pdf/, last accessed on 20 December 2014.

1214 Caianiello, M. (2010) Disclosure Before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice, 10 International Criminal Law Review, p.23.

making, it needs to bear in mind that Article 54 is only discretionary for the Prosecutor.[1215] Thus it is suggested that general or blanket protective measures are likely to undermine the rights of accused persons, although each measure must be assessed in its particular context. Further, Article 54 does not authorise incomplete or late disclosures. It is further suggested that decisions not to disclose must not be unilateral but tested before the Chamber in relation to their impact on justice and fair trial. A simple allegation that there is risk to a witness just because they are testifying against an accused[1216] is too much of a generalization. There must be a serious assessment of such an allegation. For the purposes of fair trial, any doubts arising from such allegations should be resolved in favour of the defence. Lack of proper decision-making procedures as regards disclosure only tarnishes the jurisprudence of the ICC. Thus it is submitted that only trustworthy evidence demonstrating the likelihood of such an alleged risk to a witness, duly examined as to its creditworthiness by the defence and the Chamber, would help to justify a balanced decision. It is further suggested that credible non-disclosure principles should be developed on a case to case basis. They should exhaust all possible options[1217] that reflect the necessity for such measures and the nature of each witness's circumstances.[1218] In doing so, such measures should be fair, impartial, proportional to the circumstances and strictly limited to the exigencies of the situation.[1219] If there is no likelihood of a fair trial, the defence has always opted to move the chambers for a stay of proceedings.[1220] Therefore, the fact that stay orders on an ongoing trial have at times been ordered by the Chambers in order to guard against the vitiation of fair trial requirements[1221] demonstrates the policy perspective of some decision-makers within the

1215 Uses the word 'may.'

1216 *Prosecutor –v- Lubanga Dyilo*, Case No. ICC-01/04-01/06-1401.

1217 Such as disclosing redacted versions of witness statements.

1218 ICC Official N interview on 5 February 2015. Notes on file.

1219 Kuschnik, B. (2009) International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings Before the ICC, 9 International Criminal Law Review, p.164.

1220 ICC official J interviewed on 1 February 2015. Notes on file.

1221 *Prosecutor –v- Lubanga Dyilo*, Case No. ICC-01/04-01/06-2517-Red, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time –Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, para 31 (July 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf last accessed on 20 December 2014.

ICC and the need to uphold the values of the international community1222 agreed at Rome. Even if they are for the benefit of intermediaries, such protective measures need to be appropriate and sufficiently robust,1223 in order to enable the accused to have sufficient time prepare for his or her defence.1224 There should never be half-measures. Where there is an allegation of a lack of proper disclosure by the OTP to the defence due to witness protective measures, the solution is not for the Chambers to order stay of proceedings. Rather, the question should be whether such withheld disclosure amounts to an affront to the accused person's right to fair trial and thus whether the court should order disclosure to correct this.1225 Further, it is not in with the spirit of the *travaux préparatoires* of the Rome Statute. It is suggested that fair trial is one of the principles that goes to the core of any credible trial process. It is a universal human value and a security for truthful testimony. Thus the ICC should always demonstrate that it takes the rights of an accused person seriously. If the ICC's trial integrity is to be respected, any violations of fair trial rights need to be halted.1226

Victim participation during pre-trial and trial has been one of the central innovations of the ICC.1227 Nevertheless, the decision to allow individuals who happen to have dual status, namely being a victim and a witness ("dual status witnesses"), 1228 to participate anonymously during trials has led to controversy over the impact this has on the enjoyment of

1222 It should be a court of fairness.

1223 *Prosecutor –v- Lubanga Dyilo*, Case No. ICC-01/04-01/06-2582, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8th July, 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', para 55-61 (October 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf/, last accessed on 20 December 2014.

1224 Aluoch, J, (2013) Ten Years of Trial Proceedings at the International Criminal Court, 12 Washington University Global Studies Law Review, p.442.

1225 *Prosecutor –v- Lubanga Dyilo* (AC), *Ibid*, *paras* 55-61.

1226 Stuart, H.V, (2008) The ICC in Trouble, 6 Journal of International Criminal Justice, pp.409-417.

1227 Plevin, A.M. (2014) Beyond a "Victims' Right": Truth-Finding Power and Procedure at the ICC, 25 Criminal Law Forum, pp.441-464.

1228 *Prosecutor –v- Bosco Ntaganda*, Situation in the Democratic Republic of Congo, Decision on Victim's Participation in Trail Proceedings, ICC-01/04-02/06-449 06-02-2015 18/24 NM T, Decision of 6 February, 2015, para 39, http://www.icc-cpi.int/iccdocs/doc/doc1915167.pdf last accessed on 13 February 2015.

fair trial rights.1229 Such an approach has been justified if based on a careful assessment of the risks faced by prospective victims who are also likely to be witnesses as some point.1230 So far, ICC practice has not required pre-determined modalities of victim participation.1231 Participation instead has been authorised on a case to case basis1232 bearing in mind the likelihood of risk being facing by an individual,1233 and the proportionality of the effect1234 on the accused. Such assessment has included: (a) the existence of an objectively justifiable risk to the safety of the person concerned or the prejudice to ongoing investigations; (b) the existence of a link between the accused person and the risk; (c) the insufficiency of current protective measures, if any; (d) an assessment of the prejudicial effect which the requested measures are likely to have on the accused and his or her fair trial rights; and (e) the obligation to periodically assess the decision authorising the measures if circumstances change.1235 It has to be observed that this is an omnibus application and a significant departure from the values and prescriptions postulated by the ground-breaking ICTY jurisprudence in the *Tadic Case* that provided for general guidance on protective measures to

1229 *Prosecutor –v- Thomas Lubanga Dyilo*, Situation in the Democratic Republic of Congo, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22nd September, 2006, ICC-01/04-01/06-462, http://www.icc-cpi.int/iccdocs/doc/doc409168.PDF, last accessed on 20 December 2014.

1230 *Ibid.*

1231 *Prosecutor- v- Nourain and Jerbo*, (Prosecutor's Response to the ''Requeˆ te des Repre´sentants Le´gaux Communs demandant a` la Chambre de Fixer les Modalite´s de Participation des Victimes dans la Proce´dure'') ICC-02/05-03/09 (29 November 2012), para.7.

1232 *Prosecutor-v- Abdallah Banda Abakaer Nourain,* Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09, 20 March, 2014, paras 15-18, http://www.icc-cpi.int/iccdocs/doc/doc1751024.pdf , last accessed on 14 January 2015.

1233 *Prosecutor –v- Germain Katanga & Ngudjolo Chui,* Decision Granting Protective Measures for Witness 323 During the In-court Testimony, ICC-01/04-01/07-1795-Red-tENG, 27 January, 2010, para. 6; see also *Prosecutor –v- Germain Katanga & Ngudjolo Chui*, Judgment on the Appeal of the Prosecutor Against the Decision of the Pre-Trail Chamber I entitled ' First Decision on the Prosecution Request for Authorization to Redact Witness Statements', ICC-01/04-01/07-475, 13 May, 2008, para 2.

1234 *Prosecutor –v- Lubanga Dyilo,* Redacted Decision on the Variation of Protective Measures under Regulation 42 on Referral from Trial Chamber II on 22 July, 2009, ICC-01/04-01/06-2209-Red, 16 March, 2010, para 10.

1235 *Prosecutor-v- Abdallah Banda Abakaer Nourain,* Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09, 20 March, 2014, paras 19-23, http://www.icc-cpi.int/iccdocs/doc/doc1751024.pdf (last accessed on 14/01/2015); See also *Prosecutor –v- Germaine Katanga and Ngudjolo Chui*, Decision on the Prosecutor's Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules, ICC-01/04-01/07-989-tENG, 25 March, 2009, para 4.

have due consideration for 'special circumstances'. 1236 Despite arguments that such assessment necessarily requires a balancing exercise,1237 it is suggested that the fact that such dual status witnesses have been allowed to participate as anonymous witnesses has proven to be controversial, complicated and problematic.1238 It clearly impinges upon the rights of an accused person and is an affront to fair trial and due process.1239 This is so because such accused persons have no opportunity to properly defend themselves against the alleged victimization. Further, it leaves the accused with no way of verifying allegations made by these victims, especially if exaggerated, as they are disclosed to the defence in a heavily redacted format.1240 If we accept the ambition of the Chambers to become a model for litigation in international criminal law,1241 decision-making has to represent a critical assessment of the conduct of proceedings that considers special circumstances of such dual status witnesses. Victims called to testify may be required to relinquish their anonymity but this is not in all circumstances.1242 Further, a balanced approach1243 which is fair1244 and expeditious will allow the court an opportunity to establish important and distinct lessons for future processes and outcomes on protective measures. The ICC has adopted victim-centred

1236 *Tadic Case*, *Op. Cit*, para 42.

1237 Moffett, L. (2014) Justice For the Victims Before the International Criminal Court, Oxon, Routledge, p.134; see also *Prosecutor –v- Germaine Katanga and Ngudjolo Chui*, Decision on the Protection of Neutral and Impartial Status of Information Providers, ICC-01/04-01/07-2055-Red, 5 May, 2010, para 11.

1238 *Prosecutor –v- Thomas Lubanga Dyilo*, Situation in the Democratic Republic of Congo, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06, 4 September, 2006, ICC-01/04-01/06-379.

1239 Zappala, S. (2010) The Rights of the Victims –v- The Rights of the Accused, 8(1) Journal of International Criminal Justice, pp.150–151.

1240 *Prosecutor –v- Bosco Ntaganda*, *Op Cit*, para 40.

1241 *Prosecutor –v- Callixte Mbarushimana*, Public Redacted Version, Decision on the confirmation of charges, ICC-01/04-01/10, 16 December, 2011, para. 38, http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf, last accessed on 21 December 2014.

1242 *Prosecutor-v- Abdallah Banda Abakaer Nourain*, paras 19-20.

1243 Kurth, M. (2009) Anonymous Witnesses Before the International Criminal Court: Due Process in Dire Straits in Stahn & Sluiter (Eds.) The Emerging Practice of the International Criminal Court, Leiden, Martinus Nijhoff Publishers, p.615.

1244 *Prosecutor -v- Ruto and Sang*, (Decision on Victims' Representation and Participation) ICC-01/09-01/11 (3 October, 2012) para. 14; Prosecutor *-v- Bemba*, (Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings), ICC-01/05-01/08-807 (12 July 2010) paras. 29–32; *Prosecutor -v- Katanga*, (Judgment on the Appeal of Mr Katanga Against the Decision of

justice1245 and also interests of other participants such as the defence and OTP. Therefore, there is need for an adoption of a witness-oriented justice that responds to witnesses including those who have the double-status role. In the event of conflict with fairness values towards the accused person, procedural justice that is a fair balance ensuring justice should be adopted.1246

(c) The Registry

The Registry under the Registrar of the ICC is another organ of the court vested with the responsibility for witness protection. This is carried out through the VWU.1247 The office has the mandate, inter alia, to protect, support and provide appropriate assistance to victims and witnesses.1248 The scheme is set in such a way that the VWU can implement protective measures such as security arrangements, counselling and any required assistance to witnesses and victims in consultation with the OTP.1249 The VWU's practice is built on the practice of its predecessor tribunals 1250 with confidentiality as the main principle for witness protection.1251 Because of this confidentiality principle, it is almost impossible to obtain access to detailed records of actual practice.1252

Trial Chamber II of 22 January 2010 Entitled ''Decision on the Modalities of Victim Participation at Trial'') ICC-01/04-01/07 (16 July 2010) paras. 40, 44.
1245 Moffat, *Op. Cit*, pp.100-101.

1246 Anonymity should be allowed if it is not prejudicial or inconsistent with the rights of an accused person. Further, anonymity should be allowed where such procedural justice is impartial and exudes fairness.

1247 Article 43(6) of the Rome Statute.

1248 *Ibid.*

1249 *Ibid.*

1250 Rydberg, A., (1999) Case Analysis: The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC, 12(2) Leiden Journal of International Law, p.455.

1251 ICC Official A interview on 10 November 2014. Notes on file.

1252 *Ibid.*

It would be self-defeating for the VWU to fail to provide physical and psychological protection, social assistance to witnesses and their families. They are persons at risk, often requiring round the clock assistance and protection at the earliest stage possible.[1253] Through cooperation and other non-procedural protective arrangements,[1254] states parties have a commitment towards providing assistance for the facilitation of the voluntary appearance of persons as witnesses,[1255] their protection and evidence preservation for the benefit of the defence and prosecution.[1256] It is therefore the duty of the VWU to balance the needs for the OTP and the defence in order to secure suitable protection for the witnesses.[1257] It has been aptly put that the VWU tries to listen to concerns from all organs including the defence section.[1258] One such example is the coordination of joint follow-up meetings and arrangements for some witnesses.[1259] Notwithstanding, the defence has a very different understanding of the current trends and practices within the VWU. The defence claims that it receives less preferential treatment from the office when it comes to witness protection.[1260] There is no equality of arms.[1261] To a certain degree, it is suggested here that such claims would be justified. This is so because the defence is not an organ of the Court but a section within the Registry. Thus its budget is not likely to be independent from that of the registry. As such the ICC would not accord it the same treatment that the OTP as an organ enjoys. It is thus submitted that the VWU's decision-making regarding protective measures has not been in the spirit of the values and aspiration enshrined within the Rome

1253 Regulation 83 of the ICC Regulations of the Registry, ICC-BD/03-01-06-Rev.1, http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/282891/RegulationsRegistryEng.pdf, last accessed on 15 February 2015.

1254 See section 2.3 of this chapter.

1255 Article 93(1) (e) of the Rome Statute.

1256 Article 93(1) (j) of the Rome Statute.

1257 ICC Official B interview on 11 November, 2014. Notes on File.

1258 *Ibid.*

1259 *Prosecutor –v- Jean-Pierre Bemba Gombo*, Victims and Witnesses Unit's Observation in Relation to document ICC-01/05-01/08-3005 - Confidential Pursuant to the Instruction of the Trial Chamber III dated 6 March, 2014, ICC-01/05-01/08, 4 June, 2014, para 4, http://www.icc-cpi.int/iccdocs/doc/doc1785259.pdf, last accessed on 19 December 2014.

1260 ICC Officials F interview on 14 November, 2014. Notes on file; see also ICC Officials J, K & M.

1261 *Ibid.*

Statute. More often than not, it is said that the interests of the OTP prevail over those of the defence.1262 Contrary to what the negotiators at Rome envisaged, this thesis supports the view of Hollis that the VWU has a dysfunctional approach. 1263 Its alleged approaches towards the defence do not conform to the dualistic nature of its mandate for protection, support and assistance of all witnesses.1264 ICC officials explain suspicions of VWU giving OTP witnesses preferential attention over defence witnesses.1265 Probably such biases have been a result of the VWU responding to a number of allegations of inefficiency and bureaucracy, namely: too much micro-management, failing management structures, intra-registry disjointed cooperation, and no sense of ownership. 1266 Further to this, past hostilities, costs and operations, 1267 witnesses' relocation disagreements and tensions between it and OTP have had a possible impact.1268 It is therefore suggested that it is the duty of the VWU to cater for the public good of all participants and not just one organ of the court. The policy perspective which is supported by the ICC's legal framework1269 is for the VWU as a participant and actor in the decision-making, to ensure equal respect for all organs so as to provide a fair distribution of protection resources. The Rome Statute is a product of, and an instrument of the world community. Its organs must therefore promote the declared objectives of the ICC as a whole. Thus the VWU's approach must at all times be

1262 ICC Official F Interview on 14 November, 2014. Notes on file.

1263 Hollis, B, *et. al*, (2013) Independent Review Team Public Report: Post Incident Review of Allegations of Sexual Assault of Four Victims Under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the ICC, 20 June, 2013, http://www.icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf , last accessed on 15 February 2015.

1264 *Ibid.*

1265 ICC Official Interviews F on 14 November 2014, J & K on 1 February 2015. Notes on file.

1266 According to the ICC Registrar, staff survey of 150 people conducted in 2014, 95% indicated that the present structure and culture at the ICC is not good. There is need for urgent change, see Open Society Justice Initiative (OSJI) (2014), ICC Registrar Discusses Restructuring and Need for a Larger Budget, Transcript of Interview with ICC Registrar Herman Von Hebel, June, 2014, http://www.ijmonitor.org/2014/07/icc-registrar-discusses-restructuring-and-need-for-larger-budget/, last accessed on 03 January 2015.

1267 Welch, T. *et al*, *Op. Cit*, pp.30-31.

1268 When it comes VWU's decision-making standards of admission into the ICC's Witness Protection Programme; see Stuart, H.V, *Op. Cit*, pp.415-416.

1269 Articles 43(6) and 68(1) and 68(4) of the Rome Statute; Rules 16 to 19 and then 87 to 88 of the ICC RPE, regulations 23*bis* of the Regulations of the Court; Regulations 79 to 91 of the Regulations of the Registry.

contextual,1270 identifying inclusive protective measures of immediate concern to witnesses. Whenever there is need, the reports of the unit to the Chambers should at all times reflect a deeper understanding of its mandate and policy considerations that are fair, impartial and promote equality.

4.3 Non-Procedural Protective Measures

The ICC's non-procedural measures for witness protection are physical protection, psychological monitoring of witness and assessments before testimony and immediately after testimony.1271 These are implemented by the VWU in the form of long and short term protection and support at all stages of the proceedings such as pre-trial, investigations or post-trial.1272 In order for witnesses to feel secure, they need to understand how the protective measures system works.1273 Some of these measures include ensuring that all logistical arrangements are taken care of. Witnesses and accompanying persons have a twenty four hour and seven days per week support team assistance during their travel to hearing locations. This allows for applications for passports or entry and exit formalities at international borders and at airports to be undertaken in a way that does not intentionally reveal the witness' identity or the reason for the travel. Safe arrival at The Hague and appropriate accommodation should also be given priority.1274 During testimony, there is a thirty minute delayed relay of proceedings through both the internet and the television screens within the public gallery sections of the courtroom. According to ICC officials, this is to allow the ICC's technology experts to redact any details that would expose, or risk exposing, the witnesses' identity.1275

1270 McDougal, MS, *et. al*, *Op. Cit*, p.196.

1271 ICC official B interview on 11 November 2014. Notes on file.

1272 *Ibid.*

1273*Prosecutor –v- Pierre Bemba,* Case No. ICC-01/05-01/08-T-151-Red-ENG CT WT 01-09-2011 1/78 WN T, Witness: CAR-OTP-PPPP-0178, transcript page 3, paras 19-21 http://www.icc-cpi.int/iccdocs/doc/doc1655683.pdf#search=Bemba%20case%20airport , last accessed on 30 December 2014.

1274 *Ibid.*

1275 ICC Official I interview on 14 November 2014. Notes on file.

In explaining non-procedural arrangements in existence, an ICC official pointed out that psychological protection exists in form of the assessment of witnesses' mental fitness before testimony, as well as ensuring that a witness is accompanied by a psychologist or familiar person into the witness stand.1276 This accompanying person is there to support the witness through his or her testimony. If it happens that the witness is uncomfortable with the courtroom, there is a separate room where a witness can sit. Further, if all the persons accompanying a witness consider it necessary for the witness not to proceed with the testimony due to his or her mental state, the Judges are informed. This ensures that witnesses are in a proper state of mind before adducing their evidence.1277 It also helps to avoid re-traumatising the witness, which may be tantamount to re-victimisation.1278 In order to avoid such re-victimization, it has been said that the VWU team comprises well trained personnel that are carefully selected during recruitment.1279 These officials provide psycho-social support, crisis intervention, information and debriefings before and after testimony and access to medical care. It is a multi-disciplinary support team conversant with trauma, sexual violence, physical security, confidentiality and logistics. It has been widely accepted that the psychological effects of giving evidence may persist even after testimony.1280 The witness protection system has little or minimal short and long term post-testimony monitoring.1281 Despite earlier proposals for an effective and systematic monitoring programme for the post-trial stage for witnesses,1282 there is no clear policy as regards follow-ups on witnesses after

1276 *Ibid.*

1277 *Ibid.*

1278 Haider, H, & Welch, T. (2010) The Use of Protective Measures for Victims and Witnesses and the Balance of Competing Interests Under International Law: The Special Case of War Crimes Trials, 28 L'Observateur des Nations Unies Special Edition on The Place of Victims in International Law, pp.37-62.

1279 ICC Official N interview on 5 February 2015. Notes on file.

1280 ICC Official H interview on 14 November 2014. Notes on file.

1281 Berkeley Report, *Op. Cit,* pp.38-54.

1282 Ingadottir, T, & Shelton, D. (2001) 'The Trust Fund for Victims', Project on International Courts and Tribunals (PICT), ICC Discussion Paper no. 3 (February 2001), http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF, last accessed on 30 December 2014.

testimony.1283 In a witness protection survey conducted by UC Berkeley Human Rights Centre, witnesses interviewed demonstrated insecurities, fears and clearly demonstrated the need for a post-testimony monitoring system.1284 Witnesses were quoted as follows: "Now that I have completed my testimony, I hope that the ICC does not abandon us."1285 Another stated that: "Now, after my testimony, I will have a bigger need of protection."1286 Thus the survey confirms the fears and apprehension that witnesses carry regarding safety assurances for the post-testimony period.1287 The ICC has required these individuals to undergo the traumatic experience of testimony. It is only fair and appropriate therefore that there should be programmes in place to assist them in this respect. The VWU should pay serious attention to post-testimony impact. In that way, their independent assessment as regards post-testimony monitoring should result in provision of satisfactory service to witnesses that have appeared before the Court.1288 Witnesses should never be used and then discarded. The decision-makers at the ICC have a duty to respond to the underlying requirements of the Rome accord with regard to the treatment of witnesses.

4.3.1 ICC Protection Programme (ICCPP)

ICCPP is a protection programme for the court whereby security and support assistance is provided to a witness as a last resort and absolute necessity and a witness and his or her close

1283 From the interviews with ICC officials, there seem to be no proper mechanisms in place for such follow up. It does not come out clearly as to what is expected of the officials as regards follow-ups. This only confirms the research conducted by the Berkeley Human Rights Centre in 2014.

1284 Human Rights Centre (UC Berkeley School of Law), (2014) Bearing Witness at the International Criminal Court: An interview Survey of 109 Witnesses, Human Rights Centre, Berkeley, p.53.

1285 *Ibid.*

1286 *Ibid.*

1287 *Ibid.*

1288 *Prosecutor v. Thomas Lubanga Dyilo* (Transcript of Status Conference), ICC-01/04-01/ 06-T-74-Conf-Exp-ENG (12 February 2008), quoted in *Prosecutor v. Lubanga* (Decision on Responsibilities for Protective Measures), ICC-01/04-01/06-1311 (24 April 2008), para. 42, http://www.icc-cpi.int/iccdocs/doc/doc751763.pdf (last accessed on 30/12/2014); *Prosecutor v. Thomas Lubanga Dyilo* (Decision regarding the Timing and Manner of Disclosure and the Date of Trial), ICC-01/04-01/06-1019 (9 November 2007), para. 20, http://www.icc-cpi.int/iccdocs/doc/doc363371.PDF, last accessed on 30 December 2014; See section 4.2 on bias allegations.

relatives are relocated away from the source of a threat.1289 The admission is triggered by a referral of the OTP or the defence upon satisfaction of a confidential eligibility criteria.1290 Through it, the VWU is also mandated to develop protocols and cooperation agreements with national and international partners with the intention of maintaining the best international practice.1291 According to ICC officials, as a measure of last resort, protection provided through participation in the ICCPP guarantees minimization and management of any risks faced by witnesses that cannot be suitably mitigated through procedural and non-procedural measures.1292 This is a very confidential programme and it is rarely mentioned in the ICC's legal framework.1293 In practice, all references to admission criteria for this programme are redacted or expunged from the public records of the court proceeding, as such information may undermine the needs of the witness.1294 This programme is operated under VWU's strict supervision1295 and with the authorisation of the chambers.1296 It is argued that, contrary to the jurisprudence and practice of common and civil jurisdictions,1297 as well as of the ICTY,1298 ICTR1299, SCSL1300 or the STL,1301 there are no known admission

1289 ICC, Understanding the International Criminal Court, p.39, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf, last accessed on 7 June 2016.

1290 Human Rights Watch (2008) Courting History: The Landmark International Criminal Court's First Years, New York, Human Rights Watch, pp.149-162, https://www.hrw.org/reports/2008/icc0708/icc0708webwcover.pdf, last accessed on 7 June 2016.

1291 Rule 16 of ICC RPE.

1292 ICC Official N Interview on 5 February 2015. Notes on file; Arbia, *Op. Cit*, p.522.

1293 It is only mentioned once in Rule 16(4) of the ICC RPE.

1294 ICC Official E interview on 13 November 2014. Notes on File.

1295 http://www.genderjurisprudence.org/documents/icc/ICC_-_Situation,_Jdgmts,_Indmts_&_Docs/DRC/Cases/Katanga_&_Ngudjolo/Decisions/Trial_Chamber_II/2009-01-12,_Katanga&Ngudjolo-TCII_Dec_on_Redaction_Process.pdf, last accessed on 21 December 2014; see also http://www.genderjurisprudence.org/documents/icc/ICC_-_Situation,_Jdgmts,_Indmts_&_Docs/DRC/Cases/Katanga_&_Ngudjolo/Decisions/Trial_Chamber_II/2011-01-10,_Katanga&Ngudjolo-TC_Grounds_Oral_Dec_Redact.pdf , last accessed on 21 December 2014.

1296 http://www.genderjurisprudence.org/documents/icc/ICC_-_Situation,_Jdgmts,_Indmts_&_Docs/DRC/Cases/Katanga_&_Ngudjolo/Decisions/Trial_Chamber_II/2009-12-22,_Katanga&Ngudjolo-TCII_Pub_Redact_Ver_Dec_on_Pros_App_to_Redact.pdf, last accessed on 21 December 2014.

1297 See chapter three of this work.

1298 UNICRI (2009), ICTY Manual on Development Practices,

criteria or policy guidelines. Furthermore, according to one NGO official cooperating with the court, the programme remains undefined and its procedures and administrative functions are not expressly known.1302 All information within it is confidential and privileged.1303

It is suggested that this is an odd arrangement that has contributed to the dysfunctional and inadequate protection which is provided. For instance, the OTP and VWU conceptualize Article 43(6) of the Rome Statute differently. The OTP considers all those at risk based on their Security Risk Assessment (SRA)1304 and Individual Risk Assessment (IRA).1305 These are tools for evaluation of witness security and upon satisfactory assessment guarantee warranting of protective measures.1306 That notwithstanding, the VWU considers only those with a high likelihood of being harmed or murdered as qualifying for protection.1307 It is

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http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf , last accessed on 02 January 2015.

1299 Witness Support and Protection at ICTR, http://ictr-archive09.library.cornell.edu/ENGLISH/geninfo/wvss.html, last accessed on 19 February 2015.

1300 Special Court for Sierra Leone (Residual Special Court for Sierra Leone) Legacy Projects, http://www.rscsl.org/legacy.html, last accessed on 19 January 2015.

1301 Rule 166 of the STL RPE.

1302 NGO Official G interview on 14t November 2014. Notes on File.

1303 ICC Official A interview on 11 November 2014. Notes on file.

1304 General level of security assessment of an area etc; see also *Prosecutor- v- Pierre Bemba* (Prosecutor's Decision concerning Prosecutor's Proposal for Redactions), ICC-01/05-01/08-58Red (31 July 2008), para. 10, http://www.icc-cpi.int/iccdocs/doc/doc793783.pdf , last accessed on 30 December 2014.

1305 Prior security related incidents of such individual, biological information, protective measures if any in place, risks the individual might have been exposed to; *Prosecutor -v- Pierre Bemba* (Decision on the Security Situation of Witnesses), ICC-01/05-01/08-202 (3 November 2008), para. 20, http://www.icc-cpi.int/iccdocs/doc/doc793795.pdf, last accessed on 31 December 2014.

1306 *Prosecutor -v- Abu Garda* (Decision Ordering the Prosecutor to Submit a Report on Witness' Security Risk Assessment), ICC-02/05-02/09-41 (30 July 2009), p.5, http://www.iclklamberg.com/Caselaw/Sudan/Garda/PTCI/41.pdf, last accessed on 31 December 2014; *Prosecutor -v- Abu Garda,* Prosecutor's Report on Witnesses' Security Risk Assessment with Confidential, Ex Parte, Prosecution and VWU only Annex A, http://www.icc-cpi.int/iccdocs/doc/doc720302.pdf, last accessed on 31 December 2014.

1307 *Prosecutor –v- Thomas Lubanga Dyilo* (Transcript of Status Conference), ICC-01/04-01/06-T-74- Conf-Exp-ENG (12 February 2008) quoted in Prosecutor –v- Lubanga (Decision on Responsibilities for Protective Measures), ICC-01/04-01/06-1311 (24 April 2008), paras. 35 & 56, http://www.icc-cpi.int/iccdocs/doc/doc751763.pdf (last accessed on 30/12/2014); see also Regulations of the Registry,

suggested that the two organs of the court entrusted with making sure that witnesses are protected are working at cross purposes. It is further suggested that the OTP assessment is clearly more realistic than the VWU's approach. It is rather difficult to prove a high likelihood of being harmed or murdered.1308 The arena within which the ICC operates can never be the same. Some circumstances are inherently more dangerous than others. Further, it is submitted that witnesses have their own peculiar individual circumstances relating to the wealth they have, family support which they receive, their well-being, skills, the respect they receive, the power they influence or have and their level of knowledge and information at their disposal. All these have a serious effect on decision-making as they may matter most to the concerned witnesses. Thus these too will hugely impact on the level of risks or harm likely to be encountered. Thus the longer it takes for a witness to be admitted into the programme, the more likely it is that they will be exposed to any probable risks.

It is further suggested that the opaque nature of the admission criteria only breeds mistrust. According to NGOs working with the court, witnesses will always get frustrated and worry in these circumstances.1309 Such an approach actually makes witnesses more vulnerable to being compromised by encouraging defendants to leak information1310 and to try to cast doubts on witnesses' safety.1311 It is argued here that clear admission criteria are basic and necessary for all decision-makers and participants to understand. It is a fundamental resource for their informed decision. Making it known only to witnesses who are about to be invited into the programme does not help the cause of the protection programme. Therefore, making

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Regulation 95 (Protection arrangements), http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/282891/RegulationsRegistryEng.pdf, last accessed on 30 December 2014.

1308 This is so because proving such would not only take a long time and risky but is also dependent on different circumstances obtaining in various situations that are being investigated by the ICC e.g. cooperation arrangements

1309 NGO individual D interview on 13 November, 2014. Notes on file.

1310 Such as speculations on witnesses admitted in the ICCPP. The Kenyan Govt representatives continuously leaked confidential information to the press and the Trial Chamber noted it as a deliberate pattern aimed at hurting integrity of the proceedings, see *Prosecutor –v- Uhuru Kenyatta*, Order Concerning the Public Disclosure of Confidential Information, ICC-01/09-02/11, 21 October, 2014, paras 9–13, http://www.icc-cpi.int/iccdocs/doc/doc1853722.pdf, last accessed on 19 January 2015.

1311 Mueller, S.D. (2013) Kenya and the International Criminal Court (ICC): Politics, the Election and the Law, 8(1) Journal of Eastern African Studies, pp. 25–42; ICC-01/09-02/11-733-Red, 18 July 2013.

the criteria known to all court officials would both expedite and secure the protection of witnesses. It is further argued that the fact that the rules allow only for the Prosecutor or defence to make an application for inclusion in the protection programme1312 guarantees no control on the part of the applicant as to how expeditiously a decision process can be brought forward. According to ICC officials, the longer it takes, the more frustrating it is for the witnesses.1313 The Rome Statute gave the participants, such as the Prosecutor and the Defence, the power to make a carefully analysed, thoughtful and independent preliminary assessment of risks to their witnesses.1314 These are their witnesses and as such their decision to ask for protection requires minimum scrutiny from the VWU.1315 In this instance, it is suggested that the VWU are unnecessary gatekeepers.

It has been suggested by some NGOs that the risk assessment by the OTP and defence should in themselves warrant admission into the ICCPP.1316 Thus it is suggested here that having another assessment and decision for the ICCPP admission from the VWU only begs the question: *Quis custodiet ipsos custodies* (who is going to guard the guardians)? Who then will essentially scrutinise the decision of the VWU? The VWU should have clearly defined parameters within which it acts as a check. The VWU's approach amounts to an unnecessary multiplication of resources, efforts and time that could be positively concentrated elsewhere. Accordingly, it has been said that it is likely that if the VWU wants to make its own independent assessment, the prospective participant in the protection program has to undergo another rigorous interview or a file review that could delay admission process and likely to

1312 Regulation 96 of the ICC Registry Regulations.

1313 ICC Official N interview on 5 February 2015. Notes on file.

1314 Conducting extensive interviews of witnesses and family members; *Prosecutor –v- Pierre Bemba* (Victims and Witnesses Unit's Observation on the Protection Measures Available on in Relation to the Individuals concerned by the Prosecutor's Proposals for Redaction), ICC-01/05-01/08-72-Red. (18 August, 2008) para. 25, http://www.icc-cpi.int/iccdocs/doc/doc820048.pdf, last accessed on 02 January 2014.

1315 It has to be noted that the degree of having frivolous applications may be there. However, the requirement of some sort of a check to ensure requirement of protection and right use of resources would need such minimum scrutiny.

1316 NGO Official G interview on 14 November, 2014. Notes on File.

increase the witness risk. 1317 Such participation can be detrimental to the individual concerned and being interviewed by two organs on the same issue is likely to be traumatic.1318

Further, the current procedure, it is argued, only exacerbates anxiety and delay. The delay affects the performance of other organs such as OTP1319 as they are doubtless anxious to secure the testimony of such witnesses.1320 In 2008 it took an estimated time of two to three months for a decision to be made1321 and in 2015 the average period remains the same.1322 VWU considers the application for inclusion in the ICCPP protection programme as mandating it to deny or allow such application.1323 This is based on the threshold level of the risk that has to be met.1324 It is suggested that this level of threshold is not sufficiently clear. It is thus further suggested that the Regulation 96 requirement for an application should be construed by the VWU as a notice to consider protecting the said witnesses. Such an approach would not only speed up the process, but will also serve to more effectively implement the procedures that are there for the protection of vulnerable witnesses.

1317 ICC Official C interview on 12 November, 2014. Notes on file.

1318 *Prosecutor –v- Pierre Bemba*, ICC-01/05-01/08-72-Red, *Op. Cit*, para. 26.

1319 *Prosecutor–v- Germain Katanga and Ngudjolo Chui* (Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules Corrigendum, IC-01/04-01/07-428-Corr, 25 April, 2008, para 61, http://www.icc-cpi.int/iccdocs/doc/doc602198.pdf, last accessed on 02 January 2015.

1320 *Prosecutor –v- Germain Katanga & Ngudjolo Chui* (Prosecution's Document in Support of Appeal Against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation), ICC-01/04-01/07-541, 2nd June, 2008, para 39, http://www.icc-cpi.int/iccdocs/doc/doc500246.pdf , last accessed on 02 January 2015.

1321 Dubuisson, M, Betrand, A., & Schander, N. (2009) Contributions of the Registry to Greater Respect for the Principles of Fairness and Expeditious Proceedings before the International Criminal Court in Stahn and Sluiter, The Emerging Practice of the International Criminal Court, Leiden, Martinus Nijhoff, p.574.

1322 ICC former Official M interview on 4 February 2015. Notes on file.

1323 Regulation 96 of the ICC Registry Regulations; *Ibid*, para. 26.

1324 *Prosecutor –v- Pierre Bemba*, ICC-01/05-01/08-72-Red, *Op. Cit*, para. 8.

The ICCPP admits individuals on an assessment of each witness' needs.1325 It is not clear at what stage the ICCPP obtains an informed consent and acceptance from the witness regarding conditions that such a witness should fulfil.1326 It is suggested that any proper protection programme should be based on the informed consent and acceptance of conditions proposed to the prospective witness at the first point of contact. However, there have been instances where witnesses have refused to live in the areas relocated, at times due to language difficulties.1327 Thus it is suggested that relocation to similar environment should always be a priority as it would easily make such witnesses blend in.1328 It has to be noted that entry into the ICCPP involves a major upheaval for a person. Such upheaval can be worse if the witness happens to be a victim as well.1329 Arrangements for such relocations are usually made in collaboration with states parties, local and international NGOs. 1330 This collaboration with states parties and local NGOs has at times worked to the detriment of the court. Inadequate protection measures have led to witnesses1331 or local NGO workers1332 being murdered while undertaking such collaboration. According to ICC official, too much faith and trust in these organizations have led to extraordinary situations such as the witness protection calamities in Kenya.1333 It has been argued that witness protection is such an intrusive arrangement that it goes to the core of the witness' identity and life, so there are

1325 ICC official N interview on 5 February 2015. Notes on file.

1326 NGO Official G interview on 14 November 2014. Notes on file.

1327 ICC Official N interview on 5 November 2015. Notes on file.

1328 On the contrary one can also argue that the suggestion might also increase the danger of the witnesses being recognised.

1329 Other factors such as environment, social, mental, employment and education prospects are part of considerations for a person into an ICCPP. This is a clearly stipulated practice of both common law and civil law jurisdictions, see Chapters 3 discussion. Further, Chapter 5 discussion on recommendations highlights such common and civil law practice as a way of moving forward.

1330 Rule 16 of ICC RPE.

1331 Allen, K. (2013) Claims of Witnesses in ICC trials 'Disappearing', http://www.bbc.co.uk/news/world-africa-21382339, last accessed on 19 January 2015.

1332 WikiLeaks' US Govt. Leaked Cable (2010) Kenya: Inadequate Witness Protection Poses Painful Dilemma (5th January, 2010), https://www.wikileaks.org/plusd/cables/10NAIROBI11_a.html last accessed on 19 January 2015.

1333 ICC Official H interview on 14 November 2014. Notes on file.

limits to what can be done.1334 In contrast to the situation in respect of domestic systems or courts, where witness protection programs are well established for effective monitoring and enforcement purposes, the ICC cannot move as fast to curb any intimidation or harm towards witnesses and those collaborating with them. Thus a reasonable approach which the ICC can adopt in such circumstances is to withdraw proceedings,1335 or issue warrants of arrests against those suspected of causing such interferences1336 or issue press releases and appeals for information.1337 ICC witnesses have unfortunately been murdered before the helpless eyes of the world community.1338 This is a sign of a flawed system and not helpful to the Court's cause. It is submitted that the ICC should remain vigilant and uphold its commitment to effective witness protection. It has been suggested that the ICC should never seek to

1334 *Ibid.*

1335 *Prosecutor –v- Uhuru Muigai Kenyatta*, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983 05-12-2014 1/3 EKT, 5 December, 2014, http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf last accessed on 15 February 2015; Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx, last accessed on 15 February 2015.

1336 *Prosecutor –v- Jean-Pierre Bemba Gumbo, Aime Kilolo Musamba, Jean- Jacques Mangenda Kabongo, Fidela Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Dated 11th November, 2014, http://www.icc-cpi.int/iccdocs/doc/doc1857534.pdf last accessed on 19 January 2015; See also, *The Prosecutor –v- Walter Osapiri Barasa*, ICC-01/09-01/13, Warrant of Arrest for Walter Osapiri Barasa, Dated 2 August, 2013, http://www.icc-cpi.int/iccdocs/doc/doc1650592.pdf last accessed on 19 January 2015.

1337 Killing of Meshack Yebei between 28 December, 2014 and 2 January, 2015, see ICC Press Release, (2015) ICC Deeply Concerned with Reported death of Mr. Meshack Yebei; stands ready to assist Kenyan Investigations, ICC-CPI-20150106-PR1081,

http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082.aspx, last accessed on 19 January 2015.

1338 Concerns about killings of Munguki members and ICC witnesses namely Virginia Nyakio killed on 8 March, 2008, See Bady, A. (2014) Reading the ICC Witness Project (un) Witness #20, #22, #34, http://thenewinquiry.com/blogs/zunguzungu/reading-the-icc-witness-project-unwitness-20-22-34/ last accessed on 19 January 2015; Maina Diambo killed on 6 July, 2008, see Allen, K. (2013) Claims of Witnesses in ICC trials 'Disappearing', http://www.bbc.co.uk/news/world-africa-21382339 last accessed on 19 January 2015; and George Wagacha & Naftali Irungu killed on 29 April, 2008, Njuguna Gitau killed on 5 November, 2009, see Musau, N. (2012) ICC Seeks to Shield Mungiki Witnesses, http://www.the-star.co.ke/news/article-95758/icc-seeks-shield-mungiki-witnesses last accessed on 19 January 2015.

withdraw cases except as a last resort.[1339] Witness protection necessitates a constant struggle[1340] in order to fulfil the requirements of the international community.

Inadequate protection measures are also associated with poor working arrangements between the ICCPP and national bodies, local and international NGOs. This is because of a lack of robust interface between the ICCPP and national protection programmes and can lead to the application of very different standards of assessment for security risks. For instance, in the case of *Prosecutor v William Ruto and Joshua Sang*,[1341] it was apparent that while the Chief Prosecutor was pushing for more protective measures for witnesses provided by the government of Kenya, the Kenyan Attorney General, Githu Muigai, took the view that as a national body, they should apply their own standards for individualised threat assessments in accordance with Kenya's Witness Protection Programme.[1342] There is probably a need for an integrated arrangement that not only answers the needs of the ICC and national bodies but also coordinates assessment standards. All parties are working towards the same aims of witness protection and the existence of aligned risk assessment resource or tools contributes to this end.

Regardless of this lack of synergy, local national bodies, local and international NGOs support the ICCPP's Initial Response System (IRS).[1343] This is a system where a protected witness triggers the quickest emergency hotline contact with the court in the event of a risk and a need for possible immediate relocation.[1344] This arrangement enables trained local

1339 ICC Official L interview on 2 February 2015. Notes on file.

1340 *Ibid.*

1341 *Prosecutor –v- William Ruto & Joshua Arap Sang,* ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, Dated 17 April, 2014, http://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf last accessed on 21 January 2015.

1342 Mathenge, O, & Musau, N. (2014) ICC Witness in Ruto Case Disappears, http://www.the-star.co.ke/news/article-167324/icc-witness-ruto-case-disappears, last accessed on 31 December 2014.

1343 ICC official N interview on 5 February 2015. Notes on file.

1344 *Prosecutor -v- Katanga and Ngudjolo Chiu* (Victims and Witnesses Unit's Considerations on the System of Witness Protection and the Practice of ''Preventive Relocation''), Case No. ICC-01/04-01/07-585 (12 June 2008), paras. 9–10, http://www.icc-cpi.int/iccdocs/doc/doc521794.pdf last accessed on 30 December 2014.

partners of the court to intervene and relocate witnesses on the ground. Such partners only use a code and cannot tell the identity of the witness contacting the IRS. Further to this, they do not know the case in which the witness is testifying.1345 Such a measure would be enormously beneficial in bringing witnesses quickly into safe environments.1346 Moreover, at present there is no clear programme for refresher training for personnel in such a sensitive and fast moving environment. Only workshops and initial training are undertaken.1347 This is so despite the ICC having training cooperation arrangements 1348 with international NGOs,1349 national NGOs and governmental organizations. Apart from employing qualified personnel trained in legal, security and psychology, the court seems not to have a clear policy as regards refresher skills training. The court needs those operating the system to keep up-to-date in such relevant skills that can enable them to keep one step ahead of criminals intending to compromise witnesses.1350 Such shortfalls have the potential of affecting the performance and capabilities of those coordinating the IRS and ultimately risking witnesses.

As part of the standard conditions of the ICCPP programme, witnesses receive money for housing and benefits.1351 This is appropriate as the witnesses become a responsibility of the court.1352 It has been argued, however, that this practice may motivate witnesses to testify

1345 ICC official N interview on 5 February 2015. Notes on file.

1346 Redress (2008), Victims and the ICC: Still Room for Improvement, http://www.redress.org/downloads/publications/ASP%20Paper%20Draft%20Nov08.pdf, last accessed on 30 December 2014.

1347 ICC Official N interview on 5 February 2015. Notes on file.

1348 See generally, Report of the Bureau on Cooperation, ICC-ASP/13/29, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ASP13-PD-ConceptNote-COOP-ENG.pdf, last accessed on 12 December 2014.

1349 Such as United Nations Office on Drugs and Crime (UNODC).

1350 None of the ICC officials interviewed seemed to have a clear idea of how often they were supposed to go for refresher trainings.

1351 ICC Official N interview on 5 February 2015. Notes on file.

1352 ICC Official F interview on 14 November, 2014. Notes on file.

against suspects due the financial incentives.1353 In many cases, the money a witness is likely to receive is more than what she or he would earn in their daily livelihoods.1354 It is suggested here that this is unfortunate as it compromises witnesses1355 and disrupts the individuals' livelihood.1356 Thus it is imperative that efforts should be made to minimise disruption to family life and livelihoods. It is further suggested that monetary amounts are a proper and necessary consideration for their security needs. Where there is a need for testimony from a relocated witness, he or she may be compelled1357 to do so *in situ* in the relocated state or on the territory of the state party pursuant to Article 93(1) (b) of the Rome Statute. In place of a testimony *in situ*,1358 there may also be video-link technology used and the location of such a witness can remain undisclosed.1359

Lack of assurances of protection on return at times make witnesses reluctant to stay in the ICCPP. One Kenyan witness who withdrew from the protection programme said that: "without assurance that we would not return to Kenya after testifying, it was very suicidal to

1353 Maliti, T., (2014) Defence for Ruto Challenges Witness 800 on Earlier Testimony, http://www.ijmonitor.org/2014/11/defense-for-ruto-challenges-witness-800-on-earlier-testimony/, last accessed on 16 February 2015.

1354A suggestion of such motivation has been a witness whose annual basic earning was 1, 150 USD opting to testify and in the end receiving 6,000 USD. See Wangui, JJ. (2014) Lawyer Says Ruto Witnesses Lured by Cash, https://iwpr.net/global-voices/lawyer-says-ruto-witnesses-lured-cash, last accessed on 30 December 2014.

1355 It has implications on fair trial rights of an accused person, as witnesses are incentivized to be biased and not testify on the truth. A witness would be motivated to exaggerate the account of events. Such exaggerations would be difficult to be verified by the accused person. See discussion in 4.2.

1356 Some witnesses may be farmers or living a certain pattern of life which is disturbed by the ICCPP admission, see ICC official H interview on 14 November, 2014. Notes on file.

1357*Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Judgment on the Appeals of William Samoei Ruto and Joshua Arap Sang Against the Decision of Trial Chamber V(A) of April, 2014 entitled, 'Decision on Prosecutor's Application for Witnesses Summonses and Resulting Request for State Cooperation, Case No. ICC-01/09-01/11 OA 7 OA8, 9 October, 2014, http://www.icc-cpi.int/iccdocs/doc/doc1847142.pdf last accessed on 30 December 2014.

1358 In its position or original place, see http://dictionary.thelaw.com/in-situ/ last accessed on 21 January 2015.

1359 http://www.ijmonitor.org/2014/04/judges-order-eight-witnesses-in-ruto-and-sang-trial-to-appear-before-icc/ last accessed on 30 December 2014.

go ahead and give evidence, then return to live with the same people I had accused."1360 Unfortunately, it appears that the ICCPP has little regard for post-testimony security continuations.1361 This makes witnesses vulnerable as it is not known to the court what sort of psychological impact the testimony had on the witness over time. It is noted that the challenge is how far the Court can go in addressing the psychological impact considering that there are limited resources available. Further, it is unknown whether there is a likelihood of retribution from the community where the witness lives. Therefore, any witness protection system that disregards or has no clear policy regarding the post-testimony circumstances of vulnerable does little to advance its purpose. It also follows that there is no clear cut-off point for the payment of upkeep money to witnesses who are in the protection programme.1362 Just as in national protection programmes,1363 there should be a set a cut-off point, for example, when a witness has found another type of livelihood. It is only necessary that there should be clarity and certainty as regards the future well-being of the witness.

Another challenge faced by the ICCPP is in relation to witnesses who are purportedly on the programme but whose cases have been withdrawn. 1364 For instance the temporary withdrawal of the *Uhuru Muigai Kenyatta Case*1365 and the permanent withdrawal of the *Muthaura Case*1366 marked another uncertain phase for the witnesses who were under

1360 Biko, N., (2013) I refused to testify, The Hague Trials, https://thehaguetrials.co.ke/article/i-refused-testify last accessed on 20 January 2015.

1361 Berkeley Human Rights Centre Report, *Op. Cit,* p.68.

1362 ICC officials B interview on 11 November 2014, notes on file and H interviews on 14 November 2014, notes on file, just talk generally about witnesses being taken care of within the program. Nothing comes out clearly on the cut-off point for these allowances.

1363 See chapter 2, section 2.2.

1364 *Prosecutor –v- Uhuru Muigai Kenyatta*, Notice of Withdrawal of Charges, ICC Doc. No. ICC-01/09-02/11-983 05-12-2014 1/3 EK T, 5 December, 2014, http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf last accessed on 30 December 2014.

1365 *Prosecutor–v-Uhuru Muigai Kenyatta*, Case No.ICC-01/09-02/11, http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf last accessed on 30 December 2014.

1366 *Prosecutor –v- Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the Withdrawal of Charges Against Mr. Muthaura, ICC Doc. ICC-01/09-02/11-696 18-03-2013 1/9 NM T, 18 March, 2013, http://www.icc-cpi.int/iccdocs/doc/doc1568411.pdf#search=Muthaura%20withdrawal%20notice last accessed on 30 December 2014.

protection. Though the Chief Prosecutor cited massive witness interference as one reasons for the withdrawal,1367 assumptions of reduced security risks because the cases are no longer being pursued may make protected witnesses more vulnerable. There is need for a cautious approach towards decision-making regarding protected witnesses for trials that have been withdrawn. There is a possibility of retribution following such withdrawals and attempts to stop the ICC from resuming the cases upon sufficient evidence being made available. The ICCPP policy is unspecific with regard to the situation of these protected witnesses. Thus such witnesses are likely to be a target for possible interference or elimination in order to turn temporary withdrawals into permanent ones. Further to this, even though charges have been permanently withdrawn, witnesses may well be eliminated for being perceived as having turned against their communities or the defendants.1368 It must be observed that it is difficult to estimate how long such appropriate protective measures must be extended for witnesses in cases of temporary withdrawal of charges. Moreover, it is unpredictable how long the Chief Prosecutor, who bears the evidential burden, will take before sufficient evidence is gathered to meet the required threshold for trial. Witnesses who come in contact with the court are always at risk due to the potential of their testimony.1369 Thus the ICCPP should consider a broader interpretation that covers a continuous individual risk assessment for those witnesses involved in both temporarily and permanently withdrawn cases, until the anticipated risk is minimised or disappears.

4.3.2 Relocation and Cooperation

The relocation of a witness clearly does not entail lifetime protection by the ICC.1370 That notwithstanding, the temporary relocation and physical protection of witnesses before and

1367 ICC (2015) Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx last accessed on 28 November 2015..

1368 NGO Official D interview on 13 November, 2014. Notes on file.

1369 Articles 43 and 68 of the Rome Statute.

1370 Maliti, T., (2011) Pena Mariana, Permanent Representative at The Hague for International Federation for Human Rights (FIDH) Expert Interview, http://www.ijmonitor.org/2011/07/expert-relocation-of-a-witness-does-not-entail-life-protection-by-the-icc/ last accessed on 21 January 2015.

after testimony is an essential element in the ICC's non-procedural measures towards witnesses.[1371] After assessment and entry into the ICCPP, a witness and his or her immediate family may be relocated within the country or outside the country, dependent on the security circumstances.[1372] Such relocations have been beset by many problems. The VWU, and specifically the ICCPP, have grappled with relocation agreements.[1373] Not many states parties are willing to enter into witness relocation agreements with the court due to a variety of reasons.[1374] Due to the lack of many relocation agreements or arrangements, geographical relocation has proved to be difficult if not impossible to attain.[1375] This has badly affected witnesses with a particular profile. For instance, polygamous witnesses have represented a challenge to the ICC's relocation arrangements.[1376] Countries whose legislation prohibits this kind of marriage have rejected such witnesses, claiming that their circumstances are an affront to public decency, order and law[1377] within their respective states. This has severely limited the number of countries where such witnesses can be relocated.

Another problematic group of witnesses has been those with 'dirty hands', or insider witnesses. This, so it has been asserted, is one of the greatest challenges faced by the ICC's

1371 ICC Official G interviews on 14 November 2014. Notes on file.

1372 ICC Official N interviews on 5 November 2015. Notes on file.

1373 ICC Official B interview on 11 November 2014, ICC official H interview on 14 November 2014 , ICC official J interview on 1 February 2015, ICC official L interview on 2 February 2015 & ICC official M interview on 4 February 2015. All these notes on file.

1374 Such reasons would be: avoidance of financial burden, lack of national witness protection systems and laws, regional interests and commitments, see also ICC, (2014) Report of the Bureau on Cooperation (Addendum), ICC-ASP/13/29/Add.2, 28 November, 2014, paras 6–8, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-Add2-ENG.pdf last accessed on 21 January 2015.

1375 This also impacts on attempts to find suitable environment for a relocated person. Relocated persons end up being sent to far away geographical locations, see ICC Official N interview on 5 February 2015. Notes on file.

1376 Summary Report on the Seminar on Protection of Victims and Witnesses Appearing before the International Criminal Court, 29–30 January, 2009, pp. 5-7, http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf last accessed on 13 December 2014.

1377 Law prohibiting polygamous marriages. See also Marriage Act, Cap. 25:01 of the Laws of Malawi.

protective measures. 1378 These are witnesses who may not bear serious criminal responsibility for crimes committed, but who may be in detention elsewhere and facing trial. Reliance on them is seen as a necessary evil as there is sometimes no alternative to obtaining better evidence.1379 Some states parties refuse to condone suspects or criminals.1380 They have no legislation in place for the condoning of limited criminal responsibility in exchange for testimony against those bearing serious or grave responsibility.1381 Prosecutors in such states are likely to focus on pursuing the principle *aut dedere aut judicare* i.e. extradite or prosecute. 1382 Although some scholars have questioned the effectiveness of this principle,1383 it is suggested that the customary status of international law may require extradition or prosecution for core international crimes such as genocide, crimes against humanity and war crimes.1384 It is suggested that to such states, it is not only those bearing serious criminal responsibility that should be prosecuted but all suspects of international crimes.1385 It is within such a states' obligations to pursue justice for the victims who have

1378 ICC Official B See also Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before The International Criminal Court (2009), pp.5-7, http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf , last accessed on 21 December 2014.

1379 ICC official N interview on 5 February 2015. Notes on file; It is easier to get witnesses to testify against those bearing most responsibility for criminality as they are insiders, close to those issuing commands for illegal acts. Only those bearing minimal responsibility can qualify to be termed 'infiltrated or insider witnesses.' Assessment of what amounts to minimal responsibility should be the duty of the Prosecutor.

1380 See also Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before The International Criminal Court (2009), pp.5-7, http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf, last accessed on 21 December 2014.

1381 *Ibid.*

1382 Van Steanberghe, R. (2011) The Obligation to Extradite or Prosecute: Clarifying its Nature, 9(5) Journal of International Criminal Justice, pp.1089-1116.

1383 Nollkaemper, A. (2013) Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in Belgium –v- Senegal, 4 Journal of International Dispute Settlement, pp.1-19.

1384 A survey of bilateral and multilateral conventions embodying such an obligation conducted by the ILC have demonstrated the practice recognition in most treaties. To this extent Reports by Special Rapporteur have been submitted for a period 2006 – 2011 in UN Documents A/CN4/571, 7 June, 2006, A/CN4/603, 10 June, 2008 and A/CN4/648, 31 May, 2011, http://legal.un.org/ilc/guide/7_6.htm, last accessed on 21 December 2014.

1385 Governments such as The Netherlands have a policy for all asylum seekers files to be forwarded to the War Crimes Office for any suspected war crimes regardless of the degree of criminal responsibility.

suffered from the crimes committed by the suspected persons.1386 Therefore, some nations are likely to turn down requests for cooperation and agreements to host insider or "dirty-handed" witnesses.

Another critical point is when insider or "dirty-handed" witnesses become *asylum witnesses*. Witnesses who are detained in their respective detaining nations awaiting criminal trial or answering some serious charges, may well seek asylum during their transfer to and testimony at The Hague. 1387 This is strategically pursued to avoid a return to custody in their respective detaining states.1388 All sorts of reasons are pleaded such as the risk of torture during or upon return, imposition of the death penalty in the detaining state or that the evidence they have adduced before the ICC is likely to incriminate them in the detaining state.1389 There appears to be an increasing tendency for insider witnesses to seek asylum to the host Dutch Government.1390 According to Irving, they would rather put their trust in the asylum protection of the host nation than in the ICC witness protection programme.1391 By way of example, three witnesses in the *Katanga case*, who were the subject of a cooperation agreement with the ICC, had been transferred into ICC custody for the purposes of testimony.

1386 Shah, S. (2013) Questions Relating to the Obligations to Prosecute or Extradite (Belgium –v- Senegal), 13(2) Human Rights Law Review, pp. 351-366; *Questions Relating to the Obligations to Prosecute or Extradite (Belgium –v- Senegal), Merits*, 20 July, 2012, para 13, http://www.icj-cij.org, last accessed on 21 December 2014.

1387 Yabasum, D, & Holvoet, M, (2013) Seeking Asylum before the International Criminal Court: Another Challenge for a Court in Need of Credibility, 13(3) International Criminal Law Review, pp.725-745.

1388 *Prosecutor –v- German Katanga* , Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC- D02-P-0228 and DRC-D02-P-0350, ICC-01/04-01/07-3405-tENG, 1 October, 2013, http://www.icc-cpi.int/iccdocs/doc/doc1679507.pdf#search=asylum, last accessed on 13 December 2014.

1389 Sluiter, G. (2012) Shared Responsibility in International Criminal Justice: The ICC and Asylum, 10(3) Journal of International Criminal Justice, pp.661-676.

1390 Three witnesses *à décharge* in the *Germain Katanga and Mathieu Ngudjolo Chui* case (Floribert Ndjabu Ngabu, Sharif Manda Ndadza Dz'Na, and Pierre-Célestin Mbodina Iribi), and a fourth witness *à décharge* in the *Thomas Lubanga Dyilo* case (Bede Djokaba Lambi Longa). There is also another two prosecution witnesses whose identities remain confidential and had travelled to ICC in January 2011 for testimony; *see also* de Boer, Tom, & Marjoleine Zieck (2015) ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host State, 27(4) International Journal of Refugee Law, pp.573-606.

1391 Irving, E. (2014) Protecting Witnesses at the International Criminal Court from Refoulement, Journal of International Criminal Justice, p.6.

They applied for asylum to the Dutch Government citing their prolonged pre-trial detention in the DRC and the likelihood of torture and danger to their lives upon return on account of their testimony.1392 The witnesses were eventually sent back to the detaining state with a further order of the VWU to fully monitor the protective measures which were taken in respect of the witnesses while in detention in the DRC.1393 It is suggested here that ordering the VWU to carry out extensive monitoring of the protective measures of witnesses in a foreign detention centre such as that of the DRC was an excessive demand on an already overburdened VWU. The resources to carry this out are not likely to be available as there are more urgent requests for protection in ongoing cases. Further to this the non-availability of resources is no lawful justification for non-compliance with the principle of non-refoulment.1394 Witnesses are likely to continue taking every available opportunity to seek asylum within Dutch territory.1395 Some scholars have sharply criticised the practice of returning asylum seekers as contrary to *non-refoulement* principle of international refugee law1396 and human rights law.1397 They have further argued that this practice complicates the cooperation arrangements between the ICC and states parties.1398 States parties are likely to be less willing in future when it comes to sending over witnesses that are within its detention.1399 Notwithstanding that the law calls for the ICC to protect witnesses regardless

1392 *Prosecutor –v- Mathieu Ngudjolo Chui*, Request for Leave to submit Amicus Curiae Observations by Mr. Schuller and Mr. Sluiter, Counsel in Dutch Asylum Proceedings of Witnesses DRC-DO2-P-0236, DRC-D02-p-0228 and DRC-D02-p-0350, 26th May, 2011, ICC-01/04-01/07-2968, para 2.

1393 *Prosecutor –v- Mathieu Ngudjolo Chui*, Order on the Implementation of the Cooperation Agreement Between the Court and the Democratic Republic of the Congo Concluded Pursuant to Article 93(7) of the Statute, 20 January, 2014, ICC-01/04-02/12 A (Appeals Chamber), http://www.icc-cpi.int/iccdocs/doc/doc1714058.pdf last accessed on 21 December 2014.

1394 Irving, E. *Op. Cit*, p.6.

1395 NGO official G interview on 14 November 2014. Notes on file.

1396 Holvet, M, (2014) Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law, 10 Journal of International Criminal Justice, pp.1-18.

1397 Irving, E. (2014) The Relationship Between the International Criminal Law and Host State: The Impact of Human Rights, 27(2) Leiden Journal of International Law, pp.479-493.

1398 Wijk, J., (2013) When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of the ICC Witnesses Seeking Asylum, Defendants Being Acquitted and Convicted Being Released, 26(1) Leiden Journal of International Law, pp.173-191.

1399 NGO Official G interview on 14 November 2014. Notes on file.

of profile,1400 when it comes to insider witnesses this law is more honoured in its breach. The failure to protect insider witnesses forfeits the only possible chance of penetrating the organizational structure of a criminal enterprise in order to convict the leadership. These are insider witnesses with minimal criminal responsibility and they play a vital role in pursuing suspects suspected of grave breaches of humanitarian law and of serious concern to the world community.1401 Their protection is vital in the interests of defeating impunity.1402 The ICC should therefore employ strategic mechanisms that would ensure that decision-making which entails protective measures do not violate principles of international law. Thus, as will be discussed later in this thesis,1403 the ICC should cultivate cooperation schemes with states parties that would secure and make available the crucial testimony without necessarily breaching the very values and legal core principles that the world community embraces. It is not so easy to achieve this.

As it will be discussed in Chapter 5, relocation to other states has always been the last resort for the ICC's witness protection practice.1404 It is submitted that this is a fundamental mistake on the part of the ICC protection system. Witnesses are protected because of the nature of the crimes involved and the testimony that they may be able to give. These are no ordinary crimes and the suspects are usually not ordinary individuals.1405 It is thus suggested that relocation has to be a priority. It is flawed reasoning to argue that relocated witnesses should have their credibility and testimony scrutinized since they would have had positive benefits of their transfer from the mostly impoverished countries to better

1400 Articles 43 and 68 of the Rome Statute.

1401 Whiting, A. (2009) In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered, 50 Harvard International Law Journal, p.348.

1402 ICC Official N on 5 February 2015. Notes on file.

1403 Chapter 5 discussion; Parallels can be drawn from the domestic protective systems of common and civil law jurisdictions.

1404 Report of the Bureau on Cooperation (13th Session, 21st November, 2014), ICC-ASP/13/29, pp.5-7, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-ENG.pdf last accessed on 13 December 2014.

1405 Cryer, R, Friman, *et. al*. (2010) An Introduction to International Criminal Law and Procedure (2nd Edition), Cambridge, CUP, pp.481-483.

livelihoods.1406 This view is an unfortunate misrepresentation of the trauma and sacrifices that comes with relocation. Such intrusive moves often involve considerable privation.1407 Witnesses who agree to relocation deserve the utmost respect as most such relocations have the potential to cause serious1408 impact on their wealth, well-being, power they hold, family relationships, community involvement, knowledge they may have acquired in their lifetime and the skills they possess. The outcome of such relocation can be devastating.

Lack of support from states parties in terms of entering into agreements for relocation purposes has materially affected the work of the ICC1409 and hampered the protection programme. Although there have been efforts to secure relocation and transfer of witnesses, the ICC has not managed to secure a substantial number of partnerships for cooperation.1410 Statistics shows that 650 1411 witnesses, victims and their families are provided with protective measures by the Court. Further, only 601412 witnesses have been relocated to 141413 countries that have an agreement with the Court.1414 Such countries could not be

1406 *Prosecutor –v- Katanga*, Case No. ICC-01/04-01/07, Second Corrigendum to the Defence Closing Brief, paras 505 – 511 (29th June, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1436184.pdf, last accessed on 21 December 2014.

1407 ICC official H interview on 14 November 2014. Notes on file.

1408 Mahoney, C, (2010) The Justice Sector Afterthought: Witness Protection in Africa, Pretoria, Institute of Security Studies, pp.43-44.

1409 ICC Official B interview on 11 November 2014. Notes on file.

1410 NGO official D interview on 13 November 2014. Notes on file.

1411 ICC (2015) ICC deeply concerned with reported death of Mr Meshack Yebei; stands ready to assist Kenyan investigations, 6 January, 2015, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1082.aspx, last accessed on 28 November 2015.

1412 CICC (2015), quoting ICC Registrar Von Hebel during an ASP side event on encouraging cooperation from states parties; CICC, 'ASP 13 Day Three: General Debate Begins as Elections Continue (Side Events)', https://ciccglobaljustice.wordpress.com/2014/12/11/asp13-day-three-general-debate-begins-as-elections-continue/, last accessed on 28 November 2015.

1413 ICC, 'Report of the Bureau on Cooperation (Addendum)' ICC-ASP/13/29/Add.2, 28 November, 2014, p.5, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-Add2-ENG.pdf, last accessed 28 November 2015.

1414 It is confidential as to how many witnesses need relocation. However, deficit of witness relocation agreements with states signals a significant problem that is unsustainable. Cases and numbers of protected

specified for security and confidentiality reasons. 1415 Thus, the number of relocated witnesses represent only four times the number of states that have signed relocation agreements with the court.1416 This is an obvious reflection of the unsuccessful cooperation strategy existing between the ICC and the Assembly of States Parties (ASP). Since there are currently 123 states parties1417 to the Rome Statute a success rate of only 14 relocation agreements1418 is hopelessly inadequate.

The failure of the states parties to step forward and enter into voluntary agreements with the ICC1419 is only one aspect of the problem. More important is the ICC practice of obtaining such agreements. States parties have a binding obligation to comply with requests from the court regarding the protection of witness.1420 However, it can be argued that this is subject to national laws of the requested state.1421 The ICC sends confidential requests to states parties with an accompanying draft or model relocation agreement.1422 It may also send *ad hoc* requests for cooperation on a specific case with a clear indication that funding is from the ICC Special Fund for Relocations. 1423 The practice of merely transmitting requests for witness protection agreements without first consulting the targeted states parties for possible

witnesses continues to grow so is the need to have more agreements. The deficit compromises security for witnesses, delays in proceeds and increased costs for trials.

1415 ICC Officials B interviews on 11 November 2014 and ICC official N interviews on 5 February 2015. Notes on file.

1416 Report of the Bureau on Cooperation, *Op. Cit*, pp.5-7.

1417 Since 2 February, 1999 to 2 January, 2015, 123 States have signed up to the treaty, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx, last accessed on 16 February 2015.

1418 Report of the Bureau on Cooperation (13th Session, 21st November, 2014), ICC-ASP/13/29, pp. 5-7, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-ENG.pdf, last accessed on 13 December 2014.

1419 Article 93(1) (j) of the Rome Statute.

1420 *Ibid*.

1421 Article 93(1) of the Rome Statute.

1422 ICC Official B interview on 11 November 2014. Notes on file.

1423 ICC Official B interview on 11 November 2014 and ICC official N interview on 5 February 2015. Notes on file.

cooperation arrangements, is ill-conceived. It is in-effective and totally ignores the particular legal complexities faced by each states party.

There are also issues to do with institutional and security capacity, education and health services, lack of actual protection programmes and legislation to comply with. For instance, a lack of proper legislation can affect the legal status of a relocated witness. Thus though willing, a state party may turn down a request for a relocation agreement because the well-being and security of witnesses cannot be guaranteed. This is, however, a misconceived conceptualization of refugee law since some states parties entered reservations to the 1951 Convention Relating to Status of Refugees1424 leading to restrictions in national legislation. For instance, Malawi acceded to the Refugee Convention and domesticated it in 1989.1425 It entered reservations in relation to designations of where refugees reside, work permit restrictions, wage earning employment restrictions and naturalization restrictions. 1426 Further, in so far as states parties accede to the Rome Statute independent of each other, there are bilateral or regional multilateral relations that may be relevant regarding cooperation with the court. It is suggested that regional law-making has established convoluted regionalist approaches to international law leading to cherry-picking of what has to be obeyed or

1424 http://www.unhcr.org/3b73b0d63.html , last accessed on 13 December 2014.

1425 Refugee Act, Chapter 11:04 of the Laws of Malawi, http://www.immigration.gov.mw/Documents/Immigration%20Anti%20curruption%20policy.pdf, last accessed on 26 January 2015.

1426 UN, (2002) Multilateral Treaties Deposited with the Secretary -General: Status as at 31st December, 2003, Volume 1 (part 1, Chap. I to XI), ST/LEG/SER.E/20, New York, United Nations Publications, p.338; see also *In the Matter of Section 10(5) of the Refugees Act (cap. 11:04) of the Laws of Malawi: Kambiriningi Khazi Jones and 14 Others –v- Refugee Committee*, Miscellaneous Civil Cause Number 313 of 2005 (High Court) (unreported), http://www.malawilii.org/mw/judgment/high-court-general-division/2005/24; see also *The State and The Department of Poverty and Disaster Management Affairs and the Commissioner for Disaster Preparedness, Relief and Rehabilitation, Ex-parte Frodovard Nsabimana and 83 Others (urban Refugees of Rwanda)* Miscellaneous Civil Application Number 19 of 2006 (High Court) (Unreported), http://www.refworld.org/publisher,HCM,CASELAW,MWI,4c9872c22,0.html, last accessed on 13 December 2014.

cooperated with.[1427] For instance the African movement[1428] against the ICC makes it unlikely for states parties within the African region to enter into witness relocation agreements with the ICC. A requested state may have very cordial relationship not just with the country within which alleged crimes are being investigated or prosecuted at the ICC but also with the individuals accused of such crimes, making it difficult to fulfil witness cooperation requests.

The challenges to cooperation outlined above are the likely reason why the court has at times prioritised non-witness evidence such as documents, video and recordings.[1429] This has been achieved with difficulty at times[1430] and despite protestations from the defence.[1431] A further way of getting around cooperation challenges has involved the ICC according priority to witnesses who may have already have made their own initiatives towards relocation.[1432] Those that cannot relocate or who are living in dangerous environments have sometimes had their evidence omitted.[1433] A lack of enhanced cooperation between the court and the international community undermines the established values of the world community. According to the ICC Registrar, the lack of cooperation provides clear evidence of a lack of trust between states parties and the ICC.[1434]

1427 Raustiala, K, (2002) The Architecture of International Cooperation: Trans-governmental Networks and the Nature of International Law, 43(1) Virginia Journal of International Law, pp.5-6.

1428 Du Plessis, M. (2013) Universalising International Criminal Law – the ICC, Africa and the problem of Political Perceptions, 249 Institute for Security Studies, p.12.

1429 According to an ICC Official E, interviewed on 13th November, 2014. Notes on file, due to recent challenges with witness protection, there is policy change and reinforcement that the ICC should move towards a modern and technologically conscious court when it comes to evidence; IBA Report, *Op. Cit*, p.18, on how fraught is the current ICC practice of live testimony and challenges of moving towards other evidentiary material that do not require witness availability.

1430 ICC official E interview on 13 November 2014. Notes on file.

1431 ICC officials J interview on 1 February 2015 and ICC official K interview on 1 February 2015. Notes on file.

1432 OTP, (2011) First Report of the Prosecutor of the International Criminal Court To the UN Security Council Pursuant to UNSCR 1970 (2011), para 44, http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf , last accessed on 21 December 2014.

1433 ICC official N interview on 5 February 2015. Notes on file.

1434 ICC Registrar Interview with OSJI, *Op. Cit, paras* 15-18.

The ICC's relationship with local civil society organisations produces another cooperation challenge. Its strategic approach seems to consider them organizations that can competently help with the implementation of protective measures. In addition, such organizations are approached as if they have capable tools for victim protection, freezing of assets and reparations as well.1435 The heavy reliance on such local non-governmental organizations is flawed and misleading at a number of levels. Firstly, notwithstanding the crucial role that has been played by non-governmental organizations when it comes to the operational mechanisms of the ICC, such actors are often not equipped with coherent institutional structures that can help facilitate witness protection.1436 It is suggested that clear policies and guidelines on assessment of NGO capacity to deliver on protective measures should be properly carried out by the court. Heavy reliance on such institutions has to a significant extent damaged witness protection measures.1437 For instance, during an interview with an ICC official it was admitted that to a greater extent some cooperation partnerships on the ground (in Kenya) had led to witnesses falling through the cracks of witnesses' confidentiality.1438 Another example involved some civil society members in the *Bemba Case* encouraging dual status witnesses to exaggerate their losses and vulnerability. In the end this has negatively affected the rights of the accused as there is no way of verifying such information, which will probably be redacted.1439 Subsuming witness protection within cooperation and investigative strategies is clearly ineffective. Witnesses are a special category, vital to justice, needing due attention just as much as victims require special attention. The ICC as a court is more centred on victims 1440 than on witnesses

1435 Report of the Bureau, *Op. Cit*, p.3; see also ICC Official N interview on 5 February 2015 & NGO official G on 14 November 2014. Notes on file.

1436 There are no clear policies as regards assessments by the ICC on an NGO capacity to deliver on these fronts.

1437 *Ibid.*

1438 *Ibid.*

1439 ICC official K interview on 1 February 2015. Notes on file.

1440 Lindberg, T, (2014) The Responsibility to Respect: Victims and Human Dignity at the International Criminal Court in Lagon, M.P & Clark, A., (Eds.) Human Dignity and the Future of Global Institutions, Georgetown, Georgetown University Press, pp. 49-66; Pena, M. (2015) Victim Participation Decision in the Ntaganda Case: How Does the System Compare to Previous Experiences?,

notwithstanding that the latter are crucial to the outcome of any trial. Compared to the well-publicised victim representation regime there is a disconcerting silence on witness protection.1441

4.3.3 Financial Resources

The lack of financial resources has also hindered not only relocation strategies but other witness protection mechanisms as well. 1442 The ICC is solely responsible for its own funding.1443 This is mainly from three sources. Firstly, *contributions assessed upon states parties* are determined on the basis of an already established basic scale used by the UN, namely a calculation of population *vis-a-vis* relative wealth of such a states party. 1444 Secondly, the court can *receive funds from the UN*, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. 1445 Thirdly, the Court is allowed to receive *voluntary contributions* from governments, international organizations or individual, businesses or other bodies. These are distinct and additional to the ICC funding. 1446 It has to be noted that voluntary contributions sometimes raise worrying concerns about the court's independence.1447 The existing financing scheme at the ICC is a result of unsuccessful negotiations at Rome1448

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http://www.ijmonitor.org/2015/02/victim-participation-decision-in-the-ntaganda-case-how-does-the-system-compare-to-previous-experiences/, last accessed on 18 February 2015.

1441 None of the ICC Officials interviewed could confidently claim that witness protection had been a success. This is one of the areas the ICC is truly grappling with.

1442 ICC Officials C on 12 November 2014, J interview on 1 February 2015 & N interview on 5 February 2015. Notes on file.

1443 Schabas, W. (2011) An Introduction to the International Criminal Court, Cambridge, CUP, p.394; Article 77(2) of the Rome Statute cannot be relied upon for levying of fines as a way of financial resource as this is a post-conviction that comes after a long period and is not definitive.

1444 Article 117 of the Rome Statute.

1445 Article 115(b) of the Rome Statute.

1446 Article 116 of the Rome Statute; this is without prejudice to Article 115.

1447 Dempsey, G.T, (2004) Reasonable Doubt: The Case Against the Proposed International Criminal Court in Driscoll, W., *et. al*. (Eds.) The International Criminal Court: Global Politics and the Quest for Justice, International Debate Association, New York, pp.59-60.

and it is unlikely for an institution to be without influence from those funding it. Voluntary contributions had to be avoided.1449 In order for the ICC to competently represent the values1450 agreed at Rome, sufficient resources are essential. International criminal courts by their nature have persistent 'runaway' costs 1451 and trials at the ICC are no exception.1452 Voluntary contributions have always been a reasonable compromise. It has to be observed that none of the ICC officials interviewed could expressly state whether or not the guidelines regarding voluntary contributions were adequate. The serious budgetary constraints have had a great impact on the implementation of the protective measures1453 such as failed long term post-testimony follow ups.1454

Some scholars have argued that the ICC's budget and size are a design reality1455 to make it a small institution with limited ability to investigate and prosecute cases.1456 An example of this is the financial challenges that accompany referrals from the UN Security Council.1457

1448 Witcshel, G., (2001) Financial Regulations and Rules of the Court, 25(3) Fordham International Law Journal, pp.665-673.

1449 Dempsey, G.T, *Op. Cit*, p.59.

1450 Including witness protective measures.

1451 Ford, S., (2010-2011) How the Leadership in International Criminal Law is Shifting From the United States to Europe and Asia: An Analysis of Spending on and Contributions to the International Criminal Court, 55 Saint Louis University Law Journal, p.954.

1452 Wippman, D. (2006) Commentary, The Costs of International Justice, 100 American Journal of International Law, p.863.

1453 ICC Officials A on 11 November 2014, B on 11 November 2014, C on 12 November 2014, J on 1 February 2015 & N on 5 February 2015. Notes on file.

1454Berkeley Report, *Op. Cit*, pp.6-9.

1455Whiting, A., (2014) Dynamic Investigative Practice at the International Criminal Court, 76 Law and Contemporary Problems, p.176.

1456*Ibid*.

1457 Judge Sang-Hyun Song, (2012) President of the ICC Remarks at the UNSC Open Debate ' Peace and Justice with a Special Focus on the Rome of the International Criminal Court', New York, 17 October, 2012, p.4, http://www.iccnow.org/documents/121017_ICC_President_remarks_to_UNSC_FINAL.pdf?utm_source=CICC+Newsletters&utm_campaign=44c748b68e-Sept_AB_Board_Message_ENG9_20_2012&utm_medium=email ,last accessed on 18 February 2015; UNSC Resolution Number 1593 of 2005, UN Doc. No. S/RES/1593(2005), 31 March, 2005,

Thus it is argued that notwithstanding the court's authority to judge crimes of individuals, there is a deliberate stifling of enabling tools1458 through restricted and insufficient funding so that the court continues to act ineffectively. 1459 Budgetary line allocations include witnesses and victims. 1460 This in a way speaks volumes regarding the policy towards witnesses. There should have been a separation of the two sections. The chart below demonstrates the decision-makers' lack of appreciation of the importance of witness protection in the budgetary allocation. Considering how critical witness protection has become to the court, an allocation of just 8% of the court's budget for both witnesses and victims is clearly inadequate.

Figure 1 (ICC Budget Allocation 2015):1461

http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf last accessed on 18 February 2015; UNSC Resolution Number 1970 of 2011, UN Doc. No. S/RES/1970, 26 February, 2011, http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf last accessed on 18 February 2015; ICC hibernating some investigations and realigning already stretched resources, Bensouda, F. (2014) Prosecutor of the International Criminal Court Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 February, 2011, http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf last accessed on 18 February 2015.

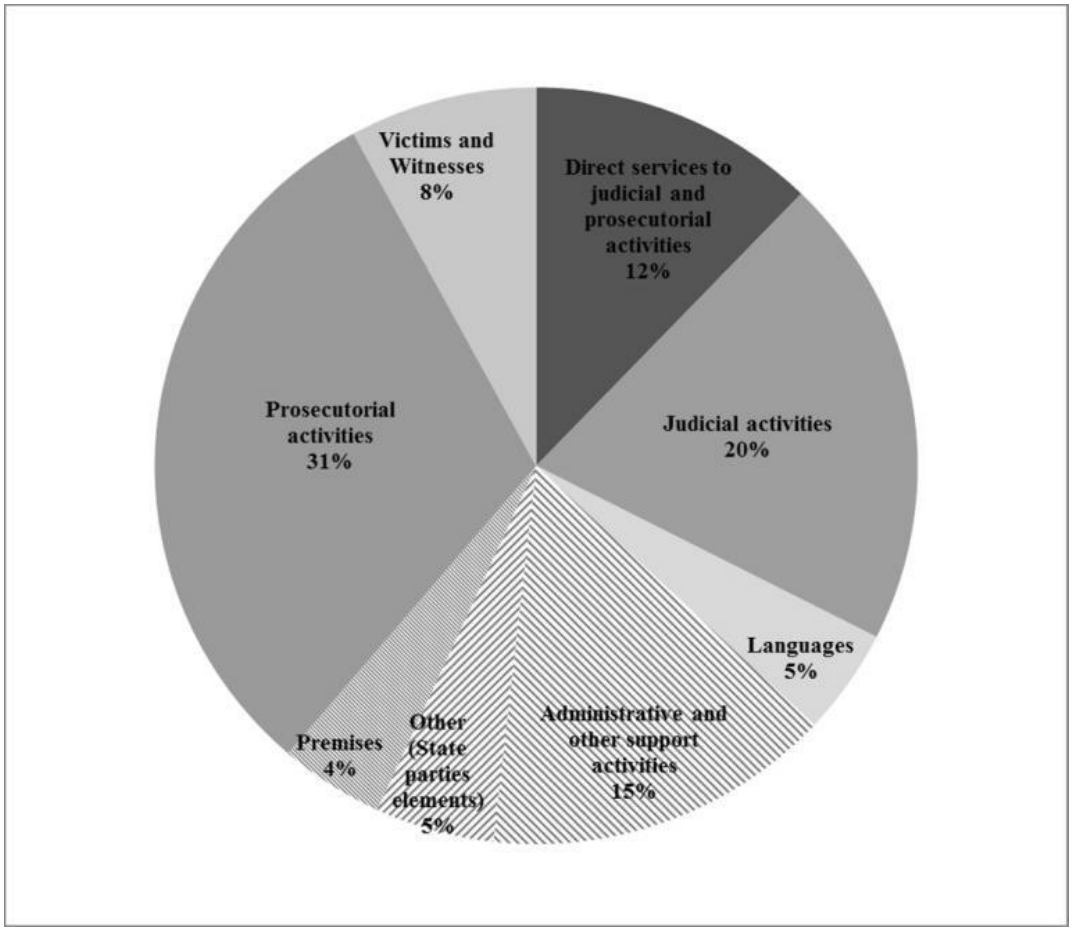
1458 Such as finances.

1459 Some scholars have called them enforcement tools. See Cassese, A. (2011) Reflections on International Criminal Justice, 9 Journal of International Criminal Justice, p.273.

1460 Proposed Programme Budget for 2015 of the ICC, ICC-ASP/13/10, p.10

http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-ENG.pdf , last accessed on 14 December 2014.

1461 *Ibid.*



Notwithstanding the level of judicial and prosecutorial activity carried out by the OTP1462 as the main driver of the court's budget,1463 the decision-makers as actors and participants in the arena of international criminal justice are not doing enough to secure the crucial testimony for trial. This is so despite the increased need for witness protection services.1464 Further, although there is a possibility of supplementing the budget with an application for more funds from the contingency fund,1465 this takes time. Witness protective measures cannot be run on monetary constraints and contingency.

1462 Such as preliminary examinations and investigative prosecutorial activities.

1463 Proposed Programme Budget, *Op. Cit*, p.10.

1464 *Ibid*, pp.60-61.

1465 Whiting, A., *Op. Cit*, p.177.

4.4 Conclusion

The ICC's approach towards witnesses has created dichotomies within the system that are difficult to reconcile. On the one hand there is a duty to protect witnesses and on the other hand there seems not only little appetite to translate such protection into practice but also a lack of concern with measures protective of the defendants' rights. This chapter has discussed contemporary witness protection trends and practices at the ICC, including the legal framework, its negotiating history, current practice and challenges. It has been argued that the current decision-making process is in disarray since the approach to witness protection at the ICC is focused almost exclusively on achieving a successful prosecution. Procedural protective measures are undermined by rule interpretation shortfalls which result in significant risks of harm to a defendant's rights. Further to this, non-procedural protective measures have fallen short of achieving the protection that the framers of the Rome Statute intended. From states cooperation through governmental bodies, national and international organizations there has been uncoordinated and underfunded action by a directionless ICCPP. Dangerously slow-paced relocations leading to continuous shortfalls have exposed witnesses to risks to their lives, to bribery,1466 uncertainty and even the temporary collapse or total collapse of cases before the Court. The ICC has grappled with what amounts to *appropriate protective measures* and to what extent such measures can be adapted in order to achieve the aims of the court while at the same time fulfilling the ideals established by the Rome Statute. When the ICC actors and decision-makers are considering witness protective measures, their policy deliberations and legal interpretations should bear justice ideals that would maximise human benefits. The ICC trial procedures comprises a hybrid and unique compromise system of varied world criminal justice systems.1467 Though common and civil law approaches have at times been chaotic and always on a collision course, 1468 the compromise has to a certain extent improved the witness protective measures in international trials. Without an adequately balanced rule of law that effectively protects both the accused person's due

1466 Teyie, A, (2013) Shock: ICC Witnesses tell of Cartel behind their move to quit case, https://www.kenya-today.com/facing-justice/shock-icc-witnesses-tell-cartel-behind-move-quit-case, last accessed on 26 January 2015.

1467 Kress, C. (2003) The Procedural Law of the International Criminal Court in outline: Anatomy of a Compromise, 1(3) Journal of International Criminal Justice, pp.603-617.

1468 May, R, & Wierda, M. (1999) Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha, 37 Columbia Journal of Transnational Law, p.725.

process rights and witnesses' and victims' rights, the resultant effect is undue advantage to the prosecution.1469 From disclosures1470 to the actual trial, the Rome Statute's aspirations of protecting witnesses should be embedded in the process.

1469 Walker, A. (2003-2004) When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and Do Protect Basic Due Process Guarantees, 106 West Virginia Law Review, p.283.

1470 *See generally*, Swoboda, S. (2008) The ICC Disclosure Regime – A Defence Perspective, 19 Criminal Law Forum, pp.449–472.

CHAPTER FIVE
RECOMMENDATIONS

5.1 Introduction

In recent years there has been considerable progress in terms of the effectiveness of ICL.1471 Such progress can be evidenced by how the ICL's central institutions1472 are organising their collaborative efforts in respect of participants such as witnesses. Proper handling of witnesses and related collaborative efforts will, amongst other things, positively contribute towards reinforcement of the court's legacy, rule of law, credibility, integrity and performance. For a court with such potential, the current interpretation and applicability of the ICC's legal and policy framework governing witness protective measures can be described as depicting an inflexible process.1473 The flaws1474 within the protection system outlined in the preceding chapter are preventing the Court from fulfilling its role in the protection of witness security1475 not to mention the overall goals of the ICC.1476 Chapter four has demonstrated that the hopes and promises of the world community as reflected in the Court's *travaux préparatoires* and incorporated into the Rome Statute have not properly been translated into the Court's practice. The Court's gap-filling and judicial policy-making1477

1471 Broomhall, B. (2003) International Justice and the International Criminal Court, Oxford, OUP, p.67.

1472 Such as the ICC, NGOS, states parties.

1473 *See generally*, Nadya, S.L, & Carden, S.R. (1999) The New International Criminal Court: An Uneasy Revolution, 88 Georgetown Law Journal, p.381.

1474 See discussion in Chapter 4, sections 4.2 & 4.3 on challenges of the ICC witness protection practice.

1475 Severe challenges of witness tampering (intimidation leading to recanting of statements) and non-cooperation, ICC-OTP (2014) Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx ,last accessed on 29 May 2016.

1476 Witness tampering leading to collapse of two cases, *Prosecutor –v- Uhuru Muigai Kenyatta*, Decision on the Withdrawal of Charges against Mr. Kenyatta, ICC-01/09-02/11-1005 13-03-2015 1/7 EC T, TC V(B), Decision of 13 March, 2015, https://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf, last accessed on 29 May 2016.; *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Application for Judgments of AcquittaICC-01/09-01/11-2027-Red 05-04-2016 1/258 NM T, Decision of April 5, 2016, para 148, https://www.icc-cpi.int/iccdocs/doc/doc2228553.pdf, last accessed on 29 May 2016.

1477 Wessel, J. (2006) Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analysing International Adjudication, 44 Columbia Journal of Transnational Law, p.385.

regarding protective measures implementation has not been encouraging.1478 There has been failure to interpret ambiguities within the Rome Statute in a way that advances the Court's objectives.1479

McDougal has argued that policy oriented inquiry encourages the cultivation of creativity, invention and evaluation of policy alternatives.1480 This is in form of recommendations or alternative solutions that can improve human welfare.1481 In line with this, this chapter proposes some policy-oriented recommendations regarding the interpretation and implementation of the ICC's witness protective measures. In anticipation of future trends regarding decision-making and the appraisal for alternative solutions, this chapter suggests solutions that can enable the Court to achieve an improved internal coordination amongst its organs and effective cooperation from its partners. It is hoped that the recommendations made in this chapter, if implemented, could assist in achieving justice, fairness and protection. The proposals will firstly consider the ICC decision-making process by analysing interpretational difficulties such as the roles of ICC organs; resources; witness circumstances or profile *i.e.* detained, infiltrated and polygamous witnesses; and cooperation *i.e*. states parties, technology issues, and the roles of and relationships with national organizations, local NGOs and international organizations. Secondly and finally, the chapter identifies a number of factors which underlie protective measures *i.e.* policy content, participants' perspectives, strategies to be employed and lessons to be learned from both national jurisdictions1482 and international criminal tribunals.

5.2 Trend Projection: Challenges to the Decision-making Process1483

Trend projection comprises a careful assessment1484 of how changing conditioning factors might lead or predict different decisions in future.1485 When dealing with processes1486

1478 This has been applicable to all ICC organs such as VWU, OTP, Defence and Chambers.

1479 Lietzau, W. (1999) Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court, 32 Cornell International Law Journal, p.481.

1480 McDougal, M, S, *Op. Cit*, Journal of Conflict Resolution, pp.345-347.

1481 *Ibid.*

1482 Common law and civil law jurisdictions.

1483 See, *infra*, Chapter 4, section 4.2

that influence procedure, such as the ICC's witness protective measures, "trend projection" is an important aspect of planning. Such trend projection has the capability of serving as a useful operational tool1487 that decision-makers or observers such as VWU, OTP, Defence and Chambers would make use of. In such an approach, there is an opportunity to identify strategic solutions and recommendations that would enable increased effectiveness. This would take into account a number of alternative future trends1488 that would promote the security of witnesses and the integrity of the Court. Further, the ICC's ability to make responsible choices amongst policy alternatives should always be subject to a consideration of their probable consequences.1489 In order for witness protective measures to help the ICC achieve its goals as envisaged at Rome, there is need for a continuous process 1490 of protection. ICC's participants and decision-makers in their perspectives and stand-points of decision-making, should always strive to employ strategies that will strike a balance between fairness to both the accused person and witnesses, value for money, efficiency and representation of justice ideals.

5.2.1 Interpretational difficulties1491

1484 Such careful assessment in this work comprises policy content, participants / decision-makers perspectives, strategies employed by decision-makers, lessons from civil and common law jurisdictions and lessons from international tribunals.

1485 McDougal, M, (1960) Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry, 4(3) Journal of Conflict Resolution, p.345; Presence or absence of factors and combinations ad discussed in Chapters 1,2,3, and 4 that will affect the good of humanity *i.e.* delivery of an effective witness protection system at the ICC.

1486 McDougal, M, & Willard, A, (1985) The World Process of Effective Power: The Global War System in McDougal, M, & Reisman, M, (Eds.) Power and Policy in Quest of Law: Essays in Honour of Eugene Victor Rostow, p.388.

1487 *Ibid.*

1488 *See generally*, Higgins, R. *Op. Cit*, International Law & Contemporary Law Quarterly, p.58.

1489 Suzuki, E, (1974) The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence, 1 Yale Studies of World Public Order, p.41.

1490 Mayo, L. & Jones, M, (1964) Legal – Policy Decision Process: Alternative Thinking and the Predictive Function, 33 George Washington Law Review, p.318.

1491 See, *infra*, Chapter 4, sections 4.2.

International actors[1492] and the international legal regime[1493] play a crucial role in legal interpretation and cannot be ignored.[1494] Their actual conduct in the power processes of interpreting laws and policies and translating such interpretations into practices for according witness protective measures depends in part upon their approach to value demands, group identifications and expectations.[1495] The interpretation and implementation of this ICC regime by actors, observers and decision-makers has so far been unpredictable.[1496] Chapter 4 has illustrated that each organ of the Court has had its own understanding of what 'appropriate protective measures' entail pursuant to Articles 43 and 68 of the Rome Statute, as read with its RPE.[1497] For the most part, the future outcomes of protective measures decisions have related to future threats and past experiences from predecessor tribunals. This has been with minimal consideration of the challenging environment of the ICC's reliance on states' cooperation. While some projections have been convincing, others such as resource constraints, have been incoherent and vague.[1498] ICC decision-makers need to articulate

1492 OTP, Chambers, Defence, Witnesses, intermediaries, ICC's cooperating partners.

1493 ICC as an international institution.

1494 *See generally*, Higgins, R., (1994) Problems and Process: International Law and How We Use It, Oxford, Clarendon Press.

1495 McDougal, M. & Lasswell, H. (1996) The Identification and Appraisal of Diverse Systems of Public Order in Beck, R. *et. al.* (Eds.) International Rules: Approaches from International Law and International Relations, New York, OUP, p.119.

1496 Surrogate or delegated investigations hugely affected witnesses and protective measures including disclosures, *Prosecutor –v- Thomas Dyilo Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842 14-03-2012 1/624 SL T, Decision of 14 March, 2012, paras 178-441, https://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf, last accessed on 29 April 2016; lack of cooperation from states parties, *Prosecutor –v- Uhuru Muigai Kenyatta*, Decision on the Withdrawal of Charges against Mr. Kenyatta, ICC-01/09-02/11-1005 13-03-2015 1/7 EC T, TC V(B), Decision of 13 March, 2015, https://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf, last accessed on 29 April 2016; *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Application for Judgments of AcquittaICC-01/09-01/11-2027-Red 05-04-2016 1/258 NM T, Decision of April 5, 2016, para 148, https://www.icc-cpi.int/iccdocs/doc/doc2228553.pdf, last accessed on 29 April 2016; *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598 09-10-2014 1/50 EK T OA7 OA8, Decision of 9 October 2014, https://www.icc-cpi.int/iccdocs/doc/doc1847142.pdf, last accessed on 29 April 2016; lack of internal coordination,; relocation challenges and lack of equal treatment towards defence witnesses, ICC interviews F, J, K.

1497 Eikel, *Op. Cit*, p.97-133.

1498 McDougal, M. & Lasswell, H. (1992) Jurisprudence of a Free Society: Studies in Law, Science and Policy, New Haven, New Haven Press, p.299.

appropriate strategic outcomes aimed at maximising the use of witness protective measures on the one hand and establishing an efficient and fair regime within the Court on the other.

It is therefore suggested that decision-making tools for an enhanced and structured inquiry should be available. Such an interpretational approach will enable decision-makers to have a wider understanding of factors and processes involved in influencing their decisions and, if robust, should also improve the coherence of such decisions across the board.1499 In this work, such decision-making tools are termed '*Protective Codes*'. These protective codes should be understood as themes drawn from decision-making experiences and the actions of international actors or individuals regarding the ICC's witness protection system. Further, these themes should help decision-makers focus attention on competing norms that reveal the range of choices available within the ICC system and their expectations1500 for empirically grounded future planning. It is therefore suggested that future witness protective measures should be interpreted in the light of law and policy considerations.1501 It is further suggested here that these should be shaped by critical protective codes drawn from overall experiences of witness protection in national jurisdictions, international tribunals and the ICC. These suggested core values of the ICC's witness protective measures regime are in in the form of: (a) fairness to all parties and participants; (b) resources; (c) cooperation; (d) technological awareness; (e) welfare of witnesses (f) capacity of the ICC (g) integrity; and (h) dependability. The discussion below mirrors such protective codes.

5.2.2 Roles of the ICC organs1502

Participants need to embrace the realities of interconnections between law and policies. There should be a humane and flexible legal interpretation and implementation of the protective measures. The VWU, Defence, OTP and Chambers should be able to properly balance their roles in a way that reflects the best interests of justice, namely the interests of witnesses,

1499 Lissitzyn, O. (1963) Review of Law and Minimum World Public Order: The Legal Regulation of International Coercion, 76 Harvard Law Review, p.670.

1500 Falk, R. (1963) Review of Law and Minimum World Public Order: The Legal Regulation of International Coercion, 8 Natural Law Forum, pp.175-177.

1501 Conflation of law and policy. The suggested critical protective codes should guide the process.

1502 See, *infra*, Chapter 4, sections 4.3.1, 4.2.

victims and accused persons. The fact that there is no equality of arms[1503] amongst the ICC's main agencies suggests a misguided interpretation of the values that were so carefully negotiated at Rome. It has been argued here that, in their approach to witness protective measures, decision-makers have tended to ignore the values, welfare and considerations of defence witnesses. In order to accommodate this reality, these ICC organs must re-evaluate their approaches.[1504] If the ICC is to realise the crucial role that the defence plays in achieving just outcomes and a fair trial there is need for a free-standing and independent organ representing its interests. It should not just be a support section of the Registry.[1505] Such a defence organ would be able to effectively look into the welfare of its witnesses. Further to this, all organs of the court should be given equal status. This will facilitate the role played by decision-makers within the defence to properly implement protective measures for its witnesses. Further such equality of arms will fully satisfy the ideals of the ICC and enable it to become a model of effective judicial administration.

In addition, there is need to fully centralise the operations of VWU. As discussed in chapter 4, the workings of the VWU have left a lot to be desired leading to tensions between it, the OTP and the Defence.[1506] Even though some practitioners have argued that such tensions have been resolved due to the Chamber providing proper guidance as regards the handling and implementation of witness protective measures,[1507] others have observed that a lot has not been done to centralise the workings of VWU in a way similar to predecessor criminal tribunals.[1508] Decision-makers within the VWU should be aware of the importance of the organisation to the operation and implementation of witness protective measures. It is recommended that the existing centralisation of power within the VWU should be focused on

1503 Sections 4.2; ICC Official Interviews J & K.

1504 Wolfrum, R., (1996) Reviewed Work: Problem and Process: International Law and How We Use It by Rosalyn Higgins, 90(1) American Journal of International Law, pp.153-155.

1505 Though this proposal is beyond the remit of witness protection, it is very relevant to the welfare of the defence witnesses, Regulation 77 of the Regulations of the Court, Adopted on 26 May, 2004, ICC-BD/01-01-04, https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf, last accessed on 29 April 2016.

1506 ICC Official Interviews J & K.

1507 ICC Official Interview N.

1508 NGO Interview G, ICC Official Interviews M & K.

administration.1509 Participants and decision-makers should be able to implement protective measures at the request of the OTP and Defence, provided that this has been endorsed by an order of the Chambers. It is up to the OTP, Defence or Chambers to see to it that witnesses are capable of being fully safeguarded by protective measures. Conversely, it is not up to the VWU to offer a legal opinion or assessment of the admissibility of a witness into the ICCPP. It is argued here that a liberal interpretation of the law,1510 points to a VWU that is there only to implement protective measures. It is an implementing organ for all protective measures ordered by the Court. The current practice of delegating assessment to the VWU not only contradicts the spirit of the Rome negotiations but also risks the lives of threatened OTP or Defence witnesses that are deemed unfit and ineligible for protection purposes. It is recommended that the VWU should never be required to fulfil a decision-making function reserved for the Chambers. It is an administrative machinery of the ICC and not a judicial organ of the Court.1511

In situations where during trial, there is opposition to a request for protective measures, it is the Chamber's duty to consider a balancing affect of the rights of the accused person and those of the witness.1512 However, in situations where no opposition from the OTP or Defence exists regarding a request for witness protective measures, the Chambers should endorse such a request.1513 The Chambers has no assessment mechanism on the ground which can determine security risks, and thus has no proper mechanism in place for decision-making in this respect, unless advised on the merits by one of the other organs. Views about a witness matter a good deal and mostly they are communicated either through the OTP or

1509 As opposed to interpretation of the law on protective measures.

1510 Articles 43 and 68 of the Rome Statute and ICC RPE.

1511 Mundis, D,A., (2003) The Assembly of States Parties and the institutional framework of the International Criminal Court, 97(1) American journal of international law, pp.132-147; Arbia, S., *Op. Cit*, pp.519-528.

1512 *Prosecutor –v- Bosco Ntaganda*, Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039, (TCVI), ICC-01/04-02/06-1049-Red 10-12-2015 1/9 RH T, Decision of 10 December 2015, https://www.icc-cpi.int/iccdocs/doc/doc2178047.pdf, last accessed on 02/05/2016.

1513 Judge Fremr refused to reconsider granting full protective measures to Witness P-886 even though the defence, Victims representative and VWU agreed to the OTP request. Only pseudonym granted with no voice and image distortion, *Prosecutor –v- Bosco Ntaganda*, Oral Decision of Judge Robert Fremr, Transcript Dated 22 October 2015, ICC-01/04-02/06-T-36-Red-ENG WT 22-10-2015 58/76 SZ T, pp.55-57, https://www.icc-cpi.int/iccdocs/doc/doc2160542.pdf, last accessed on 02/05/2015.

Defence. They should be seriously considered and adopted at all times unless contested. If contested, it is for the Chambers to deliver a balanced and justified decision. The ICC's pursuance of a welfare-based protective code should focus on safeguarding the human dignity for all its witnesses through the proper exercise of its duties and a balanced approach that respects the principle of equality of arms. This will in the end uphold the ICC's basic mandate from the international community.

5.3 Resources[1514]

Greater access to appropriate welfare resources is a matter of human dignity that is essential for all witnesses. The real fear or risk of harm to witnesses impacts upon their testimony.[1515] The OTP and Defence should require increased and sustained protection of their witnesses without interference from the VWU's purported decision making function.[1516] Such demands must reflect principles relating to rights and fundamental freedoms, wealth and resources and equality of opportunities that are appropriate when accessing all humanitarian amenities.[1517] In order for the resource protective code to be maintained, it is suggested that there should be an ongoing and constantly evaluated process of decision-making as regards resource allocation to witness protective measures efforts. It can be counter-argued that the implementation of these welfare demands requires the ICC to deploy limitless resources[1518] if it is obliged to satisfy every request for the support of witness protection. Although this is a plausible argument, the Rome obligations and promises cannot be set aside so lightly by the Court's agencies merely on grounds of budgetary restraint.

The empirical interviews in this thesis suggested that, since the creation of the Court, there has been continued and consistent pressure of resources leaving its observers, participants

1514 See, *infra*, Chapter 4, section 4.3.3

1515 Khan, K, & Buisman, C, (2015) Sitting on Evidence: Systematic Failings in the ICC Disclosure Regime – Time for Reform, in Stahn, C. (Eds.) Law and Practice of the International Criminal Court, Oxford, OUP, p.1057.

1516 4.2.2.3 discusses the misconstrued practice of the VWU assuming the role of the Chambers in interpreting the law as to who should be accorded witness protective measures.

1517 Education, security, psychological well-being, housing, employment, full-income, resources.

1518 O'Donohue, J. (2013) Financing the International Criminal Court, 13(1) International Criminal Law Review, pp.269-296.

and decision-makers with very restricted options and having to make very difficult decisions.[1519] Participants and decision-makers should aim at achieving an increased and sustainable institutional budget. Even within such a limited budgets, the fact that only eight percent of the budget is allocated to the VWU is very troubling.[1520] Worse still, this allocation must accommodate both witnesses and victims and it is not clear how this figure is divided. In any event, this is a clearly inadequate amount considering the importance of witnesses in the functioning of the Court. It is recommended that the improvement of the availability of resources for witnesses should be based on an internal overhaul of how the allocations towards witness protective measures are made. The Rome promises of the world community regarding the protection of witnesses should be fulfilled completely and not by half-measures. The constant pleas for increased funding and pledges made at ASP should be listened to.[1521] That notwithstanding, it can be argued that it is inevitable that the global economic downturn has affected the financing of the Court. The ASP, as global justice shareholders with priorities that echo the interests of their constituents, has clearly influenced the ICC's ethos of austerity.[1522] Unfulfilled financial responsibilities,[1523] contributions and pledges can affect not only the structures of authority within the ICC but also diminish its ability to deliver humanitarian policies.[1524] It therefore follows that this can have a serious impact on decision-making in respect of future protective measures and policies. It is thus proposed that, though other imperative budget demands exist, trimming witness-protection budgets should always be the last resort for decision-makers. Witnesses form the core process of a trial. Their protection should be value for money.

Further, the Special Relocation Fund (SRF) should be complementary to national systems of witness protection. Another proposal aimed at overcoming the effect of limited resources of

1519 See *infra*, ICC official Interviews A, B, C, D.

1520 See Chapter 4 of this work.

1521 Ford, S. (2015) How Much Money Does the ICC Need? In Stahn, C. (Eds.) *Op. Cit*, pp. 84–103.

1522 Kendall, S. (2015) Commodifying Global Justice: Economies of Accountability at the International Criminal Court, 13 Journal of International Criminal Justice, p.114.

1523 Reisman, M, (2005) On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court, American Journal of International Law, pp.615-618.

1524 Kendall, *Op. Cit*, p.114.

decision-makers at the Court might be to prevent the amalgamation of witness and victim resources at the VWU. Though under the same umbrella, these two should remain separate budget constituencies. It is too optimistic to hope that the ICC's finances would one day be so stable as to allow unlimited expenditure on witness protective measure implementation. That notwithstanding, there is a serious need for a re-evaluation of the current *status quo*, which is having a very serious impact on the delivery of witness protection measures. The complexity of international trials such as those at the ICC require, *inter alia* stringent witness protective measures operating in an efficient financial regime.1525 This can only be a success if the Court pursues a 'one court'1526 principle with regard to its resources. All organs of the Court must realise that they cannot financially operate in a fragmented1527 arrangement or as fiefdoms1528 each in their own entity. Rather, it should be a Court with a centralised and administrative VWU that seeks to fulfil one common mission for all organs i.e. an effective witness protection system.

5.4 Witness Circumstances or profile1529

Trends of decision-making for compromised witnesses (infiltrated witnesses), detained witnesses, polygamous witness and witnesses who are also victims, have presented considerable challenges.1530 They seriously threaten the efficiency of the ICCPP. There is a diminishing level of concern1531 for witnesses with special circumstances from both the ICC and its cooperating partners. Thus there is need for a reiteration of the purpose of the ICC and its operating arena.

1525 Ford, S. (2014) Complexity and Efficiency at International Criminal Courts 1 Emory International Law Review, p.29.

1526 The 'one court' concept first came to light during the 3rd Plenary Session of the ASP in September, 2004 within the Report of the Commission on Budget and Finance, ICC-ASP/3/18, paras 12 & 46, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-04-ENG.pdf ,last accessed on 24 June 2015.

1527 Schiff, B, (2008) Building the International Criminal Court, Cambridge, CUP, p.135.

1528 Kaul, H. (2012) The ICC of the Future, 45 Studies in Transnational Legal Policy, p.103.

1529 See, *infra*, Chapter 4, section 4.3.2

1530 See Chapter 4 of this work.

1531 See discussion in 4.3.2.

5.4.1 Detained Witnesses[1532]

The ICC's appraisals[1533] of decision-making processes for incarcerated OTP or defence witnesses in another state raise serious threats to human dignity. Such outcomes cannot be described as consequences of the Rome Statute's framework but rather as a result of choices that participants in decision-making have made pursuant to their interpretation of world community values. Relevant decision-makers have, *inter alia*, proposed asylum as a possible solution for witnesses who have given self-incriminating evidence in the Court's proceedings and are likely to face persecution or human rights violations as a result of their testimony and upon return to their detaining state.[1534] Moreover, such decision-makers have cited Article 68 of the Rome Statute as a basis for the ICC's duty to '*take all protective measures necessary to prevent the risk witnesses incur on account of their cooperation with the Court'*, and Rules 74 and 87 of the ICC RPE.[1535] Notwithstanding, it is argued that prescriptive legal processes that regulate and bind ICCPP decision-makers are fluid. Therefore, dependent on circumstances, they are in constant need of modification, refashioning or at times termination.[1536] It is therefore recommended that ICC decision-makers should consider: (a)

1532 See, *infra*, Chapter 4, section 4.3.2.

1533 Marjolein, C, & Wijk, J, (2015) Testifying Behind Bars: Detained ICC Witnesses and Human Rights Protection in Stahn, C. (Eds) *Op. Cit*, pp. 1085 –1090.

1534 *Katanga and Ngudjolo* Decision of 9 June, 2011, paras 28-30; *Katanga and Ngudjolo* Order of 24 May, 2011, para 24; Decision of the Security of Three Detained Witnesses in Relation to their Testimony before the Court (Article 68 of the Rome Statute) and Order to Request Cooperation from the Democratic Republic of Congo to provide Assistance in Ensuring their Protection in Accordance with Article 93(1)(j) of the Rome Statute, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3033, TCII, ICC, 22 June, 2011, paras 22-27.

1535 *Ibid;* the said witnesses had alleged that the Congolese authorities were concerned that they might be prosecuted by the ICC for their involvement in the commission of international crimes. This concern could prompt them to eliminate witnesses who may incriminate them. Further to this, the Congolese authorities were likely to bear a motive to silence witnesses as their testimony might affect the President's re-election.

1536 Proposals on *ReVision* Project are likely to affect ICC's Witness Protection Program, *i.e*. reconstructing some organs, terminating some sections and even effecting funding levels of the ICCPP. See Hebel, H, (2015) Increasing the Support of the International Community in the Area of Witness Protection: A Registry Perspective, http://www.international-criminal-justice-today.org/arguendo/article/hebel-increase-support-intl-community-witness-protection-Registry-Perspective/, last accessed on 24 June 2015; Reisman, T., (2014) ICC Registry Discusses Restructuring and the Need for Larger Budget, http://www.ijmonitor.org/2014/07/icc-registrar-discusses-restructuring-and-need-for-larger-budget/ ,last accessed on 24 June 2015.

strategies for the protection of all vulnerable witnesses;1537 (b) how such protection can be evaluated; and (c) how the ICC employs and monitors enforcement mechanisms for such witnesses. In order to have concrete answers to these recommendations, it is suggested that, first and foremost, any detained witnesses should never be transferred to The Hague for the purposes of adducing evidence. Where the ICC needs to obtain evidence from a detained witness, it is proposed that evidence should be produced either *in situ* or via video-link technology.1538

Rule 67 of ICC RPE governs the admissibility of live testimony by means of audio or video-link technology while Rule 68 of ICC RPE regulates the admissibility of prior recorded testimony. In processing such evidence through either of the two suggested routes, it is recommended that participants should use innovative and technological means. They should seek to respect the human rights of witnesses in such a way that is not prejudicial1539 to or inconsistent with the rights of an accused person and in accordance with the spirit of the Rome Statute. Interpretation of Rules 67 and 68 should focus on the *personal circumstances of the witness*. Categories of 'personal circumstances' are not closed and have been developed on case to case basis.1540 They have ranged from witness well-being,1541 ill-health, 1542 inimical environment to a witness such as destabilising, upsetting and unfamiliarity affecting her mental health,1543 logistical difficulties in arranging a witness's

1537 How such vulnerable witnesses can be protected; the likely keys to the creation of an environment for their protection; specific steps that the ICC can take towards optimal and realistic fulfilment of their protection.

1538 This can be by *viva-voce* testimony or prior recorded video.

1539 Allow cross-examination from the accused person.

1540 *Prosecutor –v- Katanga and Chiu*, Decision on a number of procedural issues raised by the Registry, ICC-01/04-01/07-1134 14-05-2009 1/23 CB T, Decision of 14th May, 2009, http://www.legal-tools.org/uploads/tx_ltpdb/doc688948_02.pdf , last accessed on 30 June 2015.

1541 *Prosecutor v. Jean-Pierre Bemba Gombo*, 3 February 2012, ICC-01/05-01/08-2101-Red2 03-02-2012 1/8 FB T, Public redacted decision on the PPPP-0036' Public "Prosecution request to hear Witness CAR-OTPs testimony via video-link", para. 7, http://www.iclklamberg.com/Caselaw/CAR/Bemba/TCIII/2101.pdf , last accessed on 29 June 2015.

1542 *Prosecutor –v- Jean Pierre Bemba Gombo*, Public Redacted version of the "Decision on 'Defence Motion for authorisation to hear the testimony of Witness D04-21 via video-link'", ICC-01/05-01/08-2572-Red 03-04-2013 1/8 NM T, paras 10 -12, http://www.icc-cpi.int/iccdocs/doc/doc1575874.pdf , last accessed on 29 June 2015.

1543 *Prosecutor –v- Thomas Lubanga Dyilo*, Redacted Decision on the defence request for a witness to give evidence via video-link, 9 February 2010, ICC-01/04-01/06-2285-Red, para 16, http://www.iclklamberg.com/Caselaw/DRC/Dyilo/TCI/2285.pdf, last accessed on 29 June 2015.

travel,[1544] efficient presentation of evidence and expeditious trial proceedings.[1545] It is suggested that detained witnesses should also be a category within the ambit of the Rome Statute. Decision-making should take cognisance of the processes and difficult personal circumstances of vulnerable witnesses.

Judge Ozaki in his dissenting judgement in the *Bemba Case* asserted that serious and qualifying personal circumstances categories should only be those within the ambit of the Statute and Rules.[1546] However, Judge Ozaki's categories of 'serious and qualifying personal circumstances' should be generously interpreted.[1547] Narrow or limited interpretation cannot best serve the protection of vulnerable witnesses within the Rome Statute. Therefore, proper construction of the Rome Statute, Rules 67 and 68 of RPE should be able to bring to life what its negotiators presumably intended, namely a developing meaning of witness protection.[1548] In the ICJ's jurisprudence, the negotiators are: "*…presumed to have given terms used or some of them a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law*".[1549] Though this is the case, there are other likely practical cooperation hurdles that the ICC will have to overcome. For instance, successful

1544 *Prosecutor –v- Jean Pierre Bemba Gombo*, Public redacted version of "Decision on 'Defence Motion for authorization to hear the testimony of Witness D-45 via video-link'" of 6 March 2013, ICC-01/05-01/08-2525-Red 07-03-2013 1/7 CB T, para 7, http://www.icc-cpi.int/iccdocs/doc/doc1564522.pdf, last accessed on 29 June 2015.

1545 *Prosecutor –v- Jean Pierre Bemba Gombo*, Decision on the "Submissions on the remaining Defence evidence" and the appearance of Witnesses D04-23, D04-26, D04-25, D04-36, D04-29, and D04-30 via video-link, ICC-01/05-01/08-2740 15-08-2013 1/8 NM T, paras 10 -13, http://www.icc-cpi.int/iccdocs/doc/doc1633440.pdf, last accessed on 29 June 2015.

1546 *Prosecutor –v- Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1470 31-05-2011 1/10 FB T, Decision of 31 May, 2011, para 11, http://www.legal-tools.org/uploads/tx_ltpdb/doc1082085_03.pdf , last accessed on 30 June 2015.

1547 Witness protection is a fast-moving environment where decision-makers need to be always flexible. There is need for an evolutionary interpretation that takes cognisance of the intention of the framers of the treaty and how circumstances applicable to such treaty have changed, Bjorge, E, (2014) The Evolutionary Interpretation of Treaties, Oxford, OUP, pp.1-2.

1548 A meaning that would move with changing times, challenges and environment.

1549 *Dispute regarding Navigational and Related Rights, (Costa Rica –v- Nicaragua)*, Judgment of ICJ Reports 209, 242, http://www.icj-cij.org/docket/files/133/15322.pdf , last accessed on 30 June 2015.

implementation will depend on skilful negotiating tactics from the ICC officers.1550 Further to this, other process factors affecting holding a court *in situ* include, but are not limited to, uncertainty over financial costs, logistical arrangements, length and purpose of the proceedings away from the seat of the court, cooperation matters,1551 witness security risks and the assessment of intermittent internet connectivity in the remote location.1552 Only if the benefits outweigh these risks can a court sit *in situ*.1553

It is further suggested that an inquiry into whether the detaining state abides by the rule of law and due process will have a huge bearing on the decision-making process. There should be a strong commitment towards governance, due process and the protection of basic rights.1554 This suggestion does not involve turning the ICC into a human rights lobby agency, nor requiring it to interfere in the sovereign matters of the detaining state.1555 It is rather a negotiating and cooperation arrangement with the ICC as a catalyst for change at

1550 Just like any normal national prosecution, investigators and prosecutors have to cleverly skim strategies of convincing witnesses to testify. Proper and tangible assurances from the ICC officers as regards witness protective measures and benefits that are likely to accrue to the said detained witnesses.

1551 *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial, ICC-01/09-01/11-875-Anx, para. 11, 26th August, 2013, http://www.icc-cpi.int/iccdocs/doc/doc1636030.pdf, last accessed on 26 June 2015.

1552 *Prosecutor –v- Bosco Ntaganda*, Decision on the requirements to the Presidency on holding part of the trial in the state concerned, The Presidency, ICC-01/04-02/06-645-Red 15-06-2015 1/11 EK T, Decision on 15 June, 2015, paras 15–24, http://www.icc-cpi.int/iccdocs/doc/doc1985625.pdf, last accessed on 26 June 2015; *Prosecutor –v- Bosco Ntaganda*, Recommendation to the Presidency on holding part of the trial in a state concerned, ICC-01/04-02/06-526 19-03-2015 1/14 NM T, Trial Chamber VI, Decision of 19 March, 2015, paras 10-26, http://www.icc-cpi.int/iccdocs/doc/doc1945380.pdf, last accessed on 26 June 2015.; see also *Prosecution –v- William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Issuance of a Summons for Witness 727 of 17th February, 2015, ICC-01/09-01/11-1817-Red 17-02-2015 1/15 NM T, paras 24 – 30, http://icc-cpi.int/iccdocs/doc/doc1922342.pdf, last accessed on 26 June 2015.

1553 *Ibid.*

1554 Whether the detaining state is able to provide specialised guards and surveillance cameras for such witnesses; be willing and able to enter into arrangements for implementations of protective measures; willing to detain such witnesses in a segregated and specialised secure prison facility; guards trained according to international standards; guards for the said witnesses selected and background checked with arrangements from the VWU; detaining state be willing to maintain direct and regular cooperation context with the guards without prejudice to the sovereignty of such detaining state; detaining state willing to allow VWU conduct regular visits to such detained witnesses; detaining state allowing VWU to closely monitor legal proceedings of such witnesses without prejudicing the independence and integrity of the criminal justice system; Stromseth, J.E, (2011) The International Criminal Court and Justice on the Ground, 43 Arizona State Law Journal, p.427.

1555 Marjolein, C, & Wijk, J, *Op. Cit*, pp. 1099-1100.

state and local level,1556 promoting a rule of law and due process oriented national policy for the safeguarding of detained witnesses. Regular ICC visits and monitoring mechanisms can be measures of enforcement. This is likely to be an incentive and guarantee for the integrity of testimony from witnesses on one hand and the quest for continued cooperation with the detaining state on the other.1557 Any flagrant violations of these principles should be addressed by admonitions from the UN Security Council and the ASP.1558 It is suggested that the above outlined measures can secure the protection of detained witnesses in a detaining state on the one hand and avoid recurring asylum requests1559 which are currently very common at The Hague. Insofar as detained witnesses are concerned, proper procedural protective measures1560 should be available at all times to detained witnesses.1561

Upon completion of testimony and pursuant to witness welfare it is recommended that the ICC should put in place a continuous monitoring mechanism for these witnesses in custody as a way of fulfilling its post-testimony protection strategy.1562 If such detained witnesses are

1556 Sadat, L. N, (2008) The International Criminal Court and Transformation of International Law in Sadat, L.N, & Scharf, M.P (Eds) The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni, Leiden, Martinus Nijhoff Publishers, p.314.

1557 The detaining state needs to make guarantees and assurances regarding protection of detained witnesses. Further such protection can be measured by assessment of likely intimidation or interference before and after testimony

1558 Article 112 (2) (f) & (g); 87(5) & (7); 93 of the Rome Statute; ICC Document, ICC-ASP/10/Res.5, annex, Assembly Procedures for non-cooperation, http://www.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-Non-cooperation-ENG.pdf, last accessed on 10 August 2015; on non-cooperation and referrals to the UN SC and ASP see also *Prosecutor –v- Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139 12-12-2011 1/22 NM PT, http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf last accessed on 10 August 2015; Magliveras, K., & Naldi, G. (2013) The ICC Addresses Non-Cooperation By States Parties: The Malawi Decision, 6(1) African Journal of Legal Studies, pp.137-151.

1559 Dersim, Y, & Holvoet, M. (2013) Seeking Asylum before the International Criminal Court. Another Challenge for a Court in Need of Credibility, 13(3) International Criminal Law Review, pp.725-745.

1560 Chamber supervised redactions, face distortion, use of pseudonym, limited private sessions to avoid witness incriminating himself or herself.

1561 Articles 68(1) and 43of the Rome Statute; Rules 74 and 87 of the RPE; *see also Prosecution –v- William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Issuance of a Summons for Witness 727 of 17 February, *Op. Cit*, paras 35-36.

1562 Judicial notice should be taken for the fact that in some detaining states there are pro-longed pre-trial detentions or trials can take a very long time; *see generally*, Clare, B, & Subramanian, R, (2013) Lessons from

discharged or acquitted from their charges, it is for the ICC to re-evaluate their security circumstances. Dependent on the risk assessments, they can be formally admitted into the ICCPP or relocated.

5.4.2 Infiltrated Witnesses1563

Infiltrated witnesses have been problematic for national1564 and international1565 criminal law trials for a long time. Their relevance to successful prosecution of those that bear the greatest responsibility for criminal activities cannot be underestimated.1566 It is a daunting task to identify them let alone to obtain their cooperation.1567 Their complicity in alleged heinous crimes often leads to their being demonised. Further, when the ICC decision-makers use them as witnesses and mitigate their circumstances in court, their credibility and need for protection and relocation are crucial factors in the decision-making process. 1568 Notwithstanding, protecting infiltrated witnesses presents serious legal and political problems for the ICC. States parties are reluctant to host them.1569 It is recommended that the ICC needs to establish a strategic framework that can advance effective policy intervention. Such effective policy intervention should follow the suggested protective codes in respect of fairness, cooperation, welfare, integrity and dependability. A promise of protection provides reassurance and encourages the loyalty and commitment of such witnesses. It reinforces the fundamental ideals of the witness protection system, highlighting the well-being and

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the past-remand detention and pre-trial services, 44 SA Crime Quarterly, pp. 15-24; Erickson, W.H., (1972) The Right to a Speedy Trial: Standards for Its Implementation, 10 Houston Law Review, p.237.

1563 See, *infra*, Chapter 4, section 4.3.2.

1564 Courtney III, R, E, (2012) Create Incentives to Cooperate by Protecting and Rewarding Co-operators and Stigmatise and Separately Punish Obstruction of Justice, 86 Resource Material Series, pp.31-55.

1565 Del Ponte, C, (2006) Investigation and Prosecution of Large-scale Crimes at the International Level The Experience of the ICTY, 4(3) Journal of International Criminal Justice, pp.539-558; Schrag, M, (2004) Journal of International Criminal Justice, p.427.

1566 Courtney III, R, E, (2011) Insiders as Cooperating Witnesses: Overcoming Fear and Offering Hope, pp. 36 – 46, http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P36-46.pdf, last accessed on 1 July 2015.

1567 *Ibid.*

1568 ICC Official Interview N.

1569 See Chapter 4, 4.3.2 on infiltrated witnesses.

reliability of witnesses.1570 The ICC should be able to engage in skilful, deliberate and innovative negotiations with potential host nations. Such negotiations should involve legal and political process factors that can competently guarantee their protection.1571

Another example is the Netherlands' standard immigration service practice and Dutch Asylum Policy.1572 There is a prescribed mandatory law and policy on all files of persons that have been excluded pursuant to Article 1F of the Convention Relating to the Status of Refugees 1950.1573 Policy and law require such files to be sent to the Special War Crimes Section of the Public Prosecutor's Office.1574 This is for purposes of further scrutiny and possible prosecution (if any) on suspected war crimes. 1575 Even though this extra-territoriality principle exists, it is suggested that the prosecutorial policy discretion of decision-makers should always take into account the legal and practical pitfalls of gathering evidence in a foreign country, the availability of witnesses, the safety of witnesses, investigators and judicial staff.

In order to successfully protect infiltrated witnesses, ICC decision makers should focus on criminal justice systems that have processes concerning lower level perpetrators for purposes of successful conviction of criminal organization leadership. Such criminal justice systems

1570 Articles 43 and 68 of the Rome Statute, and ICC RPE Rules.

1571 They need inquire into the following: (a) whether a states party is willing and able to host such witnesses; (b) at what price or cost is such a states party willing and able?; (c) to what extent have the witnesses themselves have a say about the choice of the country they are being relocated?; (d) are witnesses in a position to block such possible relocation?; (e) are there any possible prosecutions in such a states party?; (f) for how long can the witnesses be hosted by such a states party?.

1572 Ministry of Security and Justice (2015) The Netherlands Not a Refuge for War Criminals and Human Rights Offenders, https://ind.nl/EN/organisation/themes/1F ,last accessed on 01 July 2015.

1573 *Ibid.*

1574 *Ibid.*

1575 Van Wijk, J, & Bolhuis, M, P, (2015) Alleged War Criminal s in the Netherlands: Excluded from Refugee Protection, wanted by the Prosecutor, 12(2) European Journal of Criminology, pp.151–168.

have plea bargaining tools[1576] that can competently serve as the basis for relocation negotiations. Even international courts have acknowledged and utilised plea bargaining tools.[1577] Such tools involve the court, defence and prosecution in reaching a satisfactory negotiated disposition of cases.[1578] Essential elements include counsel's duty to freely advise on a guilty plea as a demonstration of remorse and mitigating factor for the acts committed;[1579] the accused having complete freedom of choice, with the aid of counsel's advice, whether to plead guilty or not guilty[1580] since unfettered freedom of choice and trust is essential to a plea bargaining agreement.[1581]

Plea bargaining is a system that has been subjected to a wide range of criticisms, including that it is an irrational and destructive method of administering justice.[1582] That notwithstanding, it is submitted that with the decision-processes checked and fairly balanced,

1576Vogler, R, (2005) A World View of Criminal Justice, Aldershot, Ashgate, pp. 170–171; Terrill, R, (1999). World Criminal Justice Systems: A survey, Cincinnati, Anderson Publishing, p.68.

1577*Prosecutor –v- Tadorovic, et. al* (Case Number IT-95-9-PT) Second Amended Indictment (19 November, 1998), http://www.icty.org/x/cases/todorovic/ind/en/todorovic_981119eng_indictment.pdf last accessed on 01 July 2015; *Prosecutor –v- Kambanda* (Case Number ICTR-97-23-S), Judgment and Sentence, (4 September, 1998), para 3, http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-97-23/trial-judgements/en/980904.pdf last accessed on 01 July 2015.

1578 *R-v- Turner* [1970] 2 All ER 281, CA.

1579 Alschuler, A.W. (1975) Defense Attorney's Role in Plea Bargaining. 84 Yale Law Journal, p.1180.

1580 Bushway, S, D, *et. al*, (2014) An Explicit Test of Plea Bargaining in the "Shadow of the Trial", 52 (4) Criminology, pp.723-754.

1581 Thomas, P. (1978) Plea Bargaining in England, 69 Journal of Criminal Law and Criminology, p.174.

1582 Nicol, K, (2016) Plea bargaining in international criminal courts: dealing with the Devil, LLM Thesis (R), Glasgow University, http://theses.gla.ac.uk/7254/1/2016NicolLLM%28R%29.pdf, last accessed on 02 May 2015; The prosecutor acts in several unethical and unfair roles as judge, prosecutor and legislator. He may be acting as a judge with the goal of doing the 'right thing' for the defendant in view of the defendant's social circumstances or peculiar circumstances of his crime. The prosecutor may be acting as an administrator with a goal to dispose of each case in the fastest and most efficient manner. Further, he may be acting as an advocate with a goal of maximising both the number of convictions and the severity of sentences imposed. He would mostly accept a plea agreement only when its assurance of conviction outweighs the loss in sentence severity. He may be acting as a legislator with an intention of granting consensus because the law is too harsh not only for the defendant before him but all defendants; Alschuler, A,(1968) The Prosecutor's Role in Plea Bargaining, 36 University of Chicago Law Review, pp.52-53.

this is a system that can effectively serve the interests of justice. It dignifies the circumstances of witnesses, victims and accused persons. It is a system that allows for effective resource allocation to reach a mutually agreed end result and provides greater system flexibility.1583 Despite the practice being described as both controversial1584 and empowering1585 giving opportunities for victims, and not serving the ends of justice in the international arena,1586 the very fact that low-level perpetrators are engaged by ICC investigators and prosecutors as witnesses,1587 demonstrates the usefulness of a plea bargaining policy obtaining within the court. Such processes are not public. It is therefore imperative that in negotiations for the relocation of infiltrated witnesses, priority should be given to jurisdictions that have plea bargaining tools. In such situations, it is suggested that there can be swift and smooth decision-making as such jurisdictions are likely to be sympathetic to protected witnesses who might have committed low level criminality but are testifying against those bearing greatest responsibility for ICC crimes.

5.4.3 Polygamous witnesses and witnesses with extended or large families1588

These fall in the same category as extended families1589 or large families1590 in terms of their experiences with witness protection. In terms of cooperation,1591 the facilitation of

1583 Dixon, A, & Demirdjian, R, (2005) Advising Defendants About Guilty Pleas before International Courts, 3 Journal of International Criminal Justice, p.694; It has also been held that resources and time should never be the main reason for plea bargaining negotiations and agreements, see *Prosecutor –v- Nikolic* (Case Number IT-02-60/1-S), Sentencing Judgment (2 December, 2003), para 67, http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf , last accessed on 01 July 2015.

1584 Tieger, A & Shin, M, (2005) Plea Agreements in the ICTY – Purpose, Effects and Propriety, 3 Journal of International Criminal Justice, p.674.

1585 Petrig, A, (2008) Negotiated Justice and the Goals of International Criminal Tribunals – With a Focus on a Plea Bargaining Practice of the ICTY and the Legal Framework of the ICC, 8 Chicago-Kent Journal of International and Comparative Law, p.23.

1586 Rauxloh, R, (2012) Plea Bargaining in National and International Law, Oxon, Routledge, p.246.

1587 ICC official N.

1588 See, *infra*, Chapter 4, section 4.3.2.

1589 Abdel-Monem. T. (2003) Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?, 40 American Criminal Law Review, pp.1250-1255.

1590 Varese, F, (2006) How Mafias Migrate: The Case of the Ndrangheta in Northern Italy, 40(2) Law and Society Review, pp.411-444.

protection and relocation of such witnesses can be a huge challenge.1592 It is suggested that cultural diversity as regards the treatment of witnesses is something that should to some extent be a process factor and given consideration. The ICC serves witnesses from varied geographical locations of the world community of states parties and clearly they are likely to have different cultural backgrounds.1593 In decision-making for these kinds of witnesses, witness protective measures should mirror such varied geographical backgrounds. Both civil and common law jurisdictions have struggled with this challenge. Further the *ad hoc* international criminal tribunals have also had an experience with this. Relocations to very different neighbourhoods where culture and customs and the geographical environment are very different have created serious risks for protected witnesses. 1594 It is difficult to integrate them and avoid detection.1595 Respect for the culture and customs1596 of the areas where a protected witness is relocated can, however, have a positive impact on the protected witness. Therefore, decision-makers at the ICC in pursuing the welfare of protected witnesses can avoid problems of cultural disharmony by prioritising negotiations for relocation agreements with states parties that are in the same geographical location as the state where the witnesses are coming from. 1597 For instance, instead of relocating such Kenyan witnesses to a European country, they would be better protected within the neighbouring states that have a similarly situated cultural environment.1598

1591 Oosterveld, V., Perry, M., & Mcmanus, J., (2001) Cooperation of States with the International Criminal Court, 25(3) Fordham International Law Journal, p.767.

1592 They move as one unit and refuse to be separated, see the discussion in section 4.3.2.

1593 Charlesworth, H. (1999) Feminist Methods in International Law, 93 American Journal of International Law, p. 397; Charlesworth, H., Chinkin, C., & Wright, S., (1991) Feminist Approaches to International Law, 85 American Journal of International Law, p.613.

1594 Varese, F., Law and Society Review, *Op Cit*, pp.411-444.

1595 Fyfe, N.R, & Mckay, H. (2000) Witness Intimidation, Forced Migration and Resettlement: A British Case Study, 25(1) Transactions of the Institute of Geographers, pp.85 -86.

1596 Jusufspahic, A (2013) Witness Protection Program in Bosnia and Herzegovina in Cases of Organised Crime, 15(2) Varstvoslovje Journal of Criminal Justice and Security, pp.271-272.

1597 Relocation to a similar premised geographical state party.

1598 The neighbouring states can mean any African country with similarly situated cultural set-up. One can argue that this may heighten their risk, however, the fact that they are in a region where they can be easily identified such as Europe heightens their security more.

5.5 Cooperation1599

Ratner has recently argued that justice at a global level needs to concern itself with a much broader set of duties, namely the duties of all global state actors towards one another.1600 It can be added that such a broader set of duties cannot be fulfilled if the processes are flawed and there are no tangible cooperation processes from within and without. It is recommended that internal and external cooperation mechanisms for the ICC's witness protective measures need to evolve continuously in order to operationalise the Court's policy. Power, politics and legal realities must be taken into account.1601 Since there has been conflict and and power struggle as regards the implementation of witness protective measures in the past, 1602 current internal cooperation challenges are embedded in biased implementation processes and strategies.1603 Further to this, there are two significant participants, namely the defence and the witnesses themselves, 1604 who are increasingly becoming assertive as regards protective measures. As rightly observed by ICC Officials K, L, M and N, the Defence needs to become an organ of its own and a very authoritative participant in the affairs of the ICC. It is recommended that by according such Defence section, a full organ statuts, there is likely to be considerations of duty and mutual fair treatment towards all relevant participants in

1599 See, *infra*, Chapter 4, section 4.3.2

1600 *See generally*, Ratner, S, (2015) The Thin Justice of International Law: A Moral Reckoning of the Law of Nations, Oxford, OUP.

1601 Bosco, D, (2014) Rough Justice: The International Criminal Court in a World of Power Politics, OUP, Oxford, pp.139-145.

1602 Eikel, M, (2015) External Support and Internal Coordination – The ICC and the Protection of Witnesses, in Stahn (Eds.) *Op. Cit*, pp. 1105-1107; Official interviews N & See also, Chapter 4 on cooperation challenges; Rome Statute's Article 68(1) on responsibility for witness protection to the Court, Article 57(3) (c) on chambers provision for protection and privacy of victims and witnesses, Article 64(2) on the Chamber ensuring that there is a fair and expeditious trial full of respect for the accused person's rights and due regard for the protection of victims and witnesses.

1603 Interviews with actors at the ICC and some cooperating partners point to the fact that there is continued lack of coordination among the OTP, VWU and Defence. Allegations of bias by the VWU towards OTP regarding decision-making in implementation of protective measures are very much alive; Interviews K, L, M, N.

1604 Little or lack of assurances of safety among protected witnesses has increased apprehensive attitude towards the Court leading to demands for improved protection, withdrawal from protection program and continuous litigation before Chambers; *see also Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Public Redacted Version of "Request for Leave to Appeal the "Decision on Appointment of Duty Counsel for a Witness" (ICC-01/09-01/11-1775-Conf)" filed on 18 January 2015, (TC), ICC-01/09-01/11-1784-Anx-Red 24-02-2015 7/17 EO T, *para* 22, http://www.icc-cpi.int/iccdocs/doc/doc1926994.pdf , last accessed on 03 July 2015; Biko, N., (2013) I refuse to Testify, https://thehaguetrials.co.ke/article/i-refused-testify last accessed on 03 July 2015.

decision-making processes. This will in the end improve both engagement and consultations among VWU, OTP, Defence and Chambers. Further to this, it can definitely improve internal coordination and cooperation. The Defence should not be side-lined in these considerations and as a quasi-organ of the Court, should play a full role when it comes to the implementation of protective measures. Further, balanced investigations[1605] regarding witness interference or administration of justice offences can improve coordination and trust.[1606] Biased[1607] investigations and prosecutions only increase internal tensions and undermine the legitimacy of the court.

5.5.1 States Parties[1608]

The ICC faces regular difficulties regarding external or international cooperation from states parties[1609] and cooperating partners such as local and international NGOs.[1610] States parties are the Court's focus when it comes to cooperation[1611] and successful implementation of witness protective measures.[1612] That notwithstanding, it has been observed that the many cooperation concessions to state sovereignty which are contained

1605 *Prosecutor* v. *Walter Osapiri Barasa*, ICC-01/09-01/13, http://www.icc-cpi.int/iccdocs/doc/doc1650592.pdf, (last accessed on 03/07/2015); *Prosecutor* v. *Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, http://www.icc-cpi.int/iccdocs/doc/doc1857534.pdf last accessed on 03 July 2015.

1606 Hieramente, M, *et. al*, (2014) Barasa, Bribery and Beyond: Offences Against the Administration of Justice at the International Criminal Court, 14(6) International Criminal Law Review, pp.1123-1149.

1607 *Lubanga Case* is a classical example of the OTP ignoring misconduct as regards witnesses within its own unit, see also *Prosecutor* v. *Thomas Dyilo Lubanga*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, Decision of 14 March, 2012, para 483, http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf , last accessed on 03 July 2015; *Prosecutor* v. *Thomas Dyilo Lubanga*, Appeal Chamber, Prosecution Response to Requête de la Défense de M. Lubanga aux fins de communication d'éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduites en vertu de l'Article 70, ICC-01/04-01/06, Decision of 25th March, 2014 , para 9, http://www.icc-cpi.int/iccdocs/doc/doc1753007.pdf , last accessed on 03 July 2015.

1608 See, *infra*, Chapter 4, section 4.3.2

1609 Demirdijian, A (2010) Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference, 10(2) International Criminal Law Review, pp.181-208.

1610 ICC interview N.

1611 Oosterveld, V, Perry, M, McManus, J, (2001-2002) The Cooperation of States with the International Criminal Court, 25 Fordham International Law Journal, p.767.

1612 According to Articles 86 and 88 of the Rome Statute, there is a *stricto sensu* duty to cooperate and an obligation to amend national laws so as to permit full cooperation from the court respectively.

within the Statute leaves the court in a weak position1613 It is recommended that the ICC's practice of vertical cooperation1614 for obtaining confidential relocation agreements should be revaluated.1615 It is an approach that drives states parties away from the negotiating table as there is no equality of arms. A horizontal approach to negotiations and cooperation arrangements can be of great benefit to the Court and maximise the extent of confidential relocation agreements. Such an approach will promote the values of equality in cooperation matters and aid quick solutions to confidential relocation agreements problem.

The current ICC practice on confidential relocation agreements treats relocation as a last resort. 1616 Even though the relocation of witnesses is such an intrusive protective measure that can be seriously disruptive to a particular community, a horizontal approach to negotiations should enable the ICC to use it as a first resort for any threatened or vulnerable witness. Despite such an approach being disruptive, it is possibly one measure that can secure the protection of vulnerable witnesses. Numerous witnesses have either lost their lives,1617 been harmed or interfered with 1618 due to the procrastinating approach of the ICC. International criminal trials are complex and involve mostly high ranking officials who are not only politically exposed but also sophisticated individuals, often with considerable resources. Such individuals are likely to employ all conventional and unconventional means to either discredit witnesses, stop them from testifying or even engage in intimidatory and

1613 Ambos, K, (2000) The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters, 9 The Finish Yearbook of International Law, pp.413-426.

1614 the term 'vertical cooperation' first appeared on the international arena in the *Prosecutor –v- Tihomir Blaskic*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para 54, http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html last accessed on 06 July 2015; Kress, C, (2003) The Procedural Law of the International Criminal Court in outline: Anatomy of a Unique Compromise, 1 Journal of International Criminal Justice, p.614.

1615 Draft confidential relocation agreement is sent to a requested states party's central authority through the diplomatic channel; see discussion in 4.3.2.

1616 See *infra* ICC official interviews C and N.

1617 *Kenyan* Situation has had huge problems relating to this, ICC – OTP, (2015) Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr. Meshak Yebei, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-09-01-2015.aspx, last accessed on 02 May 2016.

1618 Allegations of interference have even led to lawyers being arrested in *Bemba* Case.

retributive processes. In order to prevent this at the earliest stage, the ICC should as soon as possible engage in consultations with central authorities of appropriate states parties and not engage in a vague fishing expedition of the circulation of confidential relocation draft agreements in the hope that states parties will simply agree to them pursuant to their international obligations. This will help the two parties gain familiarization and trust for each other and highlight any prospective problems such as conflicting regional commitments, conflicts within the geopolitical environment and legal and policy difficulties.

5.5.2 Technology[1619]

Notwithstanding the obvious limitations and legal obstacles,[1620] the ICC has fast embraced technological measures during its trials.[1621] It has found the use of courts *in situ* or video-link technology as opportunities to advance practical interpretation regarding requests for cooperation of both states parties and witnesses.[1622] This has even included requests for a summons to a witness.[1623] When evaluating recourse to technologies, the Chamber's decision-making has considered the witness' anticipated testimony. It assesses whether such testimony is potentially necessary for the determination of the truth.[1624] Further, the Chambers have considered the issuing of a summons as a compulsory measure and necessary

1619 See, *infra*, Chapter 4, sections 4.3.1 and 4.3.2

1620 IBA Report, *Op. Cit*, p. 18; Discussion on this see chapter 4 of this work.

1621 See *infra* ICC official interview E.

1622 Article 93(1) (b) allows the court in its discretion to request a States Party to compel witnesses to appear before the Court sitting *in situ* in the State Party's territory or by way of video-link, *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang,* Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", (AC), ICC-01/09-01/11-1598 09-10-2014 1/50 EK T OA7 OA8, *para* 40, http://www.icc-cpi.int/iccdocs/doc/doc1847142.pdf last accessed on 03 July 2015.

1623 It has been held that any other cooperation request must sufficiently satisfy the threshold of : (i) relevance, (ii) specificity and (iii) necessity; *see also Prosecutor –v- William Samoei Ruto and Joshua Arap Sang,* Public redacted version of Decision on Prosecutor's Second Supplementary Request to Summon a Witness, ICC-01/09-01/ll-1377-Red, 19 June 2014, *para.* 16 (confidential version notified same day) ; *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/1 l-1274-Corr2, *para.* 181.

1624 *Ibid*, ICC-01/09-01/11-1377-Red, para. 16.

for obtaining the testimony of the witness.[1625] As discussed above,[1626] video-link testimony has the potential for impacting on the fair trial rights of the accused person.[1627] Further, it has been argued that technologies that enable a video-link to operate smoothly are logistically and financially difficult to implement. There might also be legal challenges to use of such evidence.[1628] Another challenge is poor internet connectivity in less developed countries that can impact on the quality of the video-link transmission.[1629] States parties may have different laws on mutual legal assistance. It is not possible for all of them to amend their laws so as to co-ordinate with the ICC's legal process and framework for cooperation. The technological limitations of some states parties (especially developing nations) are likely to hinder the success of video-link testimony.

Another problem regarding the ICC's technological provision is the likelihood of decision-makers having to grapple with the legality of a witness' oath. This is especially so where there are perjury offences and the requested state has a competing jurisdiction with the ICC.[1630] It is recommended that factors for processing decision-making should include but not be limited to the law that has been violated, whether it is punishable by both the requested

1625 *Ruto and Sang* Case, ICC-01/09-01/1 l-1274-Corr2, *Op. Cit*, para. 181; Judge Olga Herrera Carbuccia has dissented that, though states parties have an obligation to cooperate pursuant to Article 93(1), such cooperation does not extend to an obligation to compel a witness to appear before the ICC either at The Hague or *in situ*. States parties have clearly agreed to cooperate and facilitate appearance and testimony of voluntary witnesses only; see also *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Dissenting Opinion of Judge Herrera Carbuccia on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Requests for State Party Cooperation', ICC-01/09-01/11-1274-Anx 29-04-2014 1/13 NM T, 29 April, 2014, http://www.icc-cpi.int/iccdocs/doc/doc1757148.pdf last accessed on 09 July 2015.

1626 Chapter 4.

1627 ICC official E; It is very difficult for the Chambers to establish the demeanour of a witness. In addition, the said witness has no fear of being held in contempt of court for untruthful testimony as there is no feeling of being within 'ICC' premises. Technically such witnesses are within the court premises when the video-link is in session at a secret location but in the witness mind this does not compel him or her to consider himself or herself to be within the said court.

1628 ICC Official E; In addition, the said witness has no fear of being held in contempt of court for untruthful testimony as there is no feeling of being within 'ICC' premises. Technically such witnesses are within the court premises when the video-link is in session at a secret location but in the witness mind this does not compel him or her to consider himself or herself to be within the said Court.

1629 ICC official E.

1630 Who is likely to claim jurisdiction primacy as regards such offences for a court session that was via video-link? Which laws take precedence? Is it the Rome Statute and its RPE or the laws of the requested state?.

state and the Court. If the witness is in the ICCPP, the Court should at the earliest opportunity negotiate for the primacy of jurisdiction and perjury trial processes.

The final issues that technology highlights for the ICC is the demeanour of a witness being affected by delayed transmission, angle of a camera, lighting in the secret location room and how the witness projects his or her body. Such factors can affect the credibility of a witness, and thereby the fair trial rights of the accused, and increase the possibility of due process litigation. It is suggested where fair trial rights are concerned, decision-makers need to take a balanced approach in negotiating and interpreting video-link testimony so as not affect the rights of both the accused person and witnesses. There should never be a blanket approach towards what should be allowable in terms of video-link testimony and which elements affect the right to fair trial. This should rather be decided on a *case by case* basis mainly dependent on the specific circumstances of each witness, states party and trial before the Chambers. Technological, legal and cooperation strategies for witnesses as regards video-link technology cannot be the same for all states parties. It will always vary from one state party to another. Further, when it comes to relocating or moving witnesses, there is a need to engage innovative cooperation arrangements that will ease the movement of such protected witnesses through international borders. Immigration authorities should be fully alerted to such possible transfers for ease of movement.

5.5.3 National Organizations, NGOs and International Organizations[1631]

ICC cooperation with national organizations, NGOs and international organizations has not been as successful as it was hoped.[1632] Contrary to what was evidenced during the discussions prior to the Rome Statute, the relationship has not been influential.[1633] NGOs have continuously evolved in their role since the enactment of the Rome Statute. Their direct influence has mainly focused on lobbying for ratification and domestication of the Rome

1631 See, *infra*, Chapter 4, section 4.3.1 and 4.3.2.

1632 Interviews B, C, D.

1633 Durham, H, (2012) The Role of Civil Society in creating the International Criminal Court Statute: Ten Years on and Looking Back, 3(1) Journal of International Humanitarian Legal Studies, pp.3- 42.

Statute.1634 Instead of understanding this new role, the ICC's decision-makers have reverted to their position during the negotiations leading to heavy reliance on NGOs for the purposes of cooperation and the implementation of protective measures. This has led to difficulties and negative impact on the operation of the Court.1635 To a greater extent it can be argued that such heavy reliance has even undermined NGOs' ability to focus on the capacity building of domestic criminal justice systems.1636 It is recommended that the ICC finds a solid and independent mechanism for implementing witness protective measures. NGOs and international organizations by their nature should not be the bedrock for witness protective measures implementation. They are generally neither designed nor organised to carry out this role. Further, their use at times as intermediaries should be discouraged as there is no proper legal framework to hold them accountable for any negative conduct towards witnesses. Such intermediary involvement may also lead to the manipulation of witnesses 1637 to the detriment of the accused person during trial. 1638 Unfairness or due process rights infringement should not be tolerated in this context.

NGOs by their nature are specialist institutions with often a narrow and focused agenda that encourages accountability only to their constituents.1639 Insofar as their power and influence during the framing of the Rome Statute cannot be overlooked,1640 their role should be

1634 Haddad, H, N, (2013) After the Norm Cascade: NGO Mission Expansion and the Coalition for the International Criminal Court, 19(2) Global Governance: A Review of the Multilateral and International Organizations, pp.187-2006.

1635 Stuart, H, V, (2008) The ICC in Trouble, 6(3) Journal of International Criminal Justice, pp.409 – 417; see also 4.3.2 discussion on cooperation problems.

1636 Bjork, C, & Goebertus, J, (2011) Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya, 14 Yale Human Rights and Development Law Journal, pp. 205-210.

1637 Buisman, C, (2013) Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, 11 Northwestern Journal of International Human Rights, pp.30-31.

1638 There have been allegations of NGOs with interest in victims and intermediaries encouraging victims who are also potential witnesses to make exaggerated statements as regards the crimes committed by the accused persons with a goal of claiming compensation; see ICC official interviews J & K.

1639 Galvin, R, J (2005-2006) The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicised Prosecution, 13 University of Miami International & Comparative Law Review, pp.44-46.

1640 Struett, M, (2004) NGOs, The International Criminal Court and the Politics of Writing International Law, 23 Governance and International Legal Theory, pp.321-322.

restricted to lobbying for ratification of the Rome Statute, victim representation if any, domestication and public awareness of the Rome Statute and the ICC respectively. Their relationship with the ICC should be synergetic and mutually accommodating1641 only to a limited extent. They should at all cost stay clear of any attempts to implement witness protective measures. In terms of this implementing role, it is advised that the ICC should focus more on national organizations (state actors) and less on NGOs. Resources should be available to facilitate a more significant and dominant presence for the ICC in each and every territory in which it is engaged.1642 This can be achieved with an ICC central liaison office opened in every nation where there is an investigation or possible prosecution being undertaken. Further, there should be the development of a proper interface between the ICC and national protection programs. Such national protection programs should ideally be encourage to adopt a similar model or similar processes to the ICC. This is the only way that synergy and the establishment of similar standards of assessment for security risks can be achieved, in order to avoid different model that promote confused cooperation strategies. This is one helpful way that will enable the ICCPP's Initial Response System (IRS) attain its goal of protecting the human rights of witnesses. An interface of operating platforms between the ICC and national organizations can also promote a clear, vibrant and systematic monitoring program for witnesses, post-trial.

Further, cooperation strategies should also include capacity-alignment with those handling the witnesses at the local level. It is suggested that there should be clear and continuous training programs that can improve on their skills, capacity and follow-up mechanisms.1643 There should be proper policy in place for post-trial follow ups. Factor processes for decision-making can include issues as to how long such follow-ups will take, security issues in the country where the witness is residing, whether relocation had been considered or not, physical and psychological protection, timelines for protective measures or their cut-off

1641 Kuzmarov, B, (2001) An Uneasy Synergy: The Relationship Between Non-Governmental Organizations and the Criminal Court, 11(7) Windsor Review of Legal and Social Issues, p.7.

1642 Vos, C, M, (2013) Investigating from Afar: The ICC's Evidence Problem, 26(4) Leiden Journal of International Law, pp.1009-1024.

1643 There is no clear policy or legal framework for follow-ups for post-testimony stage within the ICC; Berkeley Human Rights Report, *Op. Cit*; IBA Report, *Op. Cit.*

point. For efficiency of the system, it is suggested that this follow-up policy and regulation should have a proper grounding in the RPE and if possible be mandated by the Chambers. Such follow-ups should also include the cases where the OTP has withdrawn 1644 or suspended1645 prosecution of trials pursuant to Article 61(4)1646 of the Rome Statute.

5.6 Underlying Considerations

5.6.1 Policy Content1647

Policy content for protective measures should be that which promotes fairness and the welfare of not only witnesses but accused persons as well. It should be able to engage the trust and, as a result, the dependability of such witnesses. Essentially, it should be viewed as a transactional relationship. The ICC participants to decision-making should be able to make offers and give reassurances for protection in exchange for the testimony and confidence of the witnesses in the system. Witnesses should have confidence in and be able to choose who should accompany them (if need be) during their testimony. This is a basic measure of respect for the interests of justice, fairness and the psychological well-being of the witnesses. Decision makers should always bear this in mind when devising and adjudicating on procedural protective measures.

The decision in the *Ruto and Sang* Case that witness 727 be allowed to testify via video-link,1648 but only accompanied by duty counsel appointed by the registry and not a national

1644 *Prosecutor –v- Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution Notification of Withdrawal of the Charges Against Francis Kirimi Muthaura, ICC-01/09-02/11-687 11-03-2013 1/8 NM T, 11 March, 2013, paras 11-12, http://www.icc-cpi.int/iccdocs/doc/ICC-01-09-02-11-687.pdf, last accessed on 10 July 2015.

1645 *Prosecutor –v- Uhuru Muigai Kenyatta*, Notification for Withdrawal of the Charges Against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983 05-12-2014 1/3 EK T, 5 December, 2014, paras 1-3, http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf, last accessed on 10 July 2015; ICC (5 December, 2014), Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-05-12-2014-2.aspx, last accessed on 10 July 2015.

1646 Article 61(4): *Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal*.

1647 See, *infra*, Chapter 2.

lawyer of his choice for purposes of advising only on any self-incrimination, was flawed in these terms.1649 Such a decision was in serious violation of the principle of the witness' choice of counsel and not justifiable in terms of the principles set out above. 1650 The Chamber's argument that it could not allow the witness' request due to the fact that the lawyer chosen was also representing another witness and could relay information to another witnesses that he deemed important 1651 could not absolve the decision-makers from complicity in denying justice to the witness. Instead of contrasting the legal representation of an accused person with that of a witness pursuant to Article 67(1)(d) of the Rome Statute,1652 the Chamber should have a deliberate policy to allow for a free choice of a lawyer with duty counsel only in default. It is submitted that at all times truthful testimony is based on honesty and truth telling, whatever the consequences. Thus protection makes it much easier, especially when this relates to the more complicated international arena where the stakes are very high. Witnesses need to fully trust and engage with the system. There is

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1648 *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Public redacted version of Decision on Prosecution Request for Issuance of a Summons for Witness 727 of 17 February 2015, ICC-01/09-01/11-1817-Red 17-02-2015 1/15 NM T, paras 26-36, http://icc-cpi.int/iccdocs/doc/doc1922342.pdf, last accessed on 02 July 2015.

1649 *Ibid*, paras 38-39; *See also*, *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Prosecution's Communication of Information from Witness P-0019 and Request for a Status Conference, 9 December 2014, ICC-01/09-01/11-1745-Conf (with three confidential annexes). These conditions included asking: (i) to testify entirely in camera-, (ii) to be represented by a specific national lawyer and (iii) to not be asked to reveal the content of privileged communications in court. The witness confirmed that he would not testify unless his national counsel represented him, even after the Chamber ordered that a different lawyer must be appointed as duty counsel; *see also* http://www.ijmonitor.org/2015/02/judges-order-witness-727-to-testify-via-video-link-in-ruto-and-sang-trial/, last accessed on 02 July 2015.

1650 This is for purposes of avoiding self-incrimination pursuant to Rule 74 of the ICC RPE; see also *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Second Public Redacted Version of Reasons for the Decision on the Replacement of Duty Counsel for a Witness, ICC-01/09-01/11-1749-Red2 18-12-2014 1/26 EO T, 18 December, 2014, paras 14–16, http://www.icc-cpi.int/iccdocs/doc/doc1890874.pdf, last accessed on 03 July 2015.

1651 On the contrary, one can argue that excluding one lawyer from the vast choice of lawyers available is good jurisprudence as witnesses per se should not be entitled to lawyers as of right but on consideration of their circumstances. Protection makes their testimony process much easier, *see* also *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Decision on Appointment of Duty Counsel for a Witness, ICC-01/09-01/11-1775-Red 14-01-2015 1/11 NM T, 14 January, 2015, *paras* 17–24, http://icc-cpi.int/iccdocs/doc/doc1901415.pdf, last accessed on 3 July 2015.

1652 *Ibid*, para 25; Article 67(1) (d) states: *Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;*

need to fully recognise and put into practice the principle of legal and independent assistance to witnesses. It is within their right, for example, to avoid circumstances that may lead to self-incrimination.1653 Such a process is one that was envisaged by the Rome negotiations and is a reflection of the central values of the world community, from which there must be no abrogation.1654

As indicated earlier, it is argued here that, only an evolutionary,1655 liberal, generous and far-reaching1656 interpretation of the Rome Statute can help attain these values.1657 The expansive interpretation1658 of fair trial rights to witnesses is such an example. In summary, ICC decision-makers must at all times ensure that a trial is not only fair and expeditious with full respect for the rights of the accused, but also conducive to the safety of witnesses.

1653 *Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Public Redacted Version of "Request for Leave to Appeal the "Decision on Appointment of Duty Counsel for a Witness" (ICC-01/09-01/11-1775-Conf)" filed on 18 January 2015, (TC), ICC-01/09-01/11-1784-Anx-Red 24-02-2015 7/17 EO T, *para* 22, http://www.icc-cpi.int/iccdocs/doc/doc1926994.pdf, last accessed on 03 July 2015.

1654 Values of welfare, interests of justice, fairness, human dignity and well-being for all witnesses that appear before the court. This is an expansive interpretation of fair trial rights. "*Though witnesses and victims do not typically have fair trial rights, a witness is brought within the scope of the right to fair hearing as recognised in international human rights Articles 7 and 8 of the ACHPR, granting fair trial rights to individuals in the determination of rights and obligations of 'any nature'; Article 6 of ECHR and Article 14 of the ICCPR,"* Ruto & Sang Case, *Ibid*, paras 29-30.

1655 Bjorge, E, *Op. Cit*, pp.1-6.

1656 Alter, K, J, (2014) The New Terrain of International Law: Courts, Politics, Rights, Princeton, Princeton University Press, pp.3-5.

1657 Article 64(2) of the Rome Statute: *The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused* ***and due regard for the protection*** *of victims and witnesses* (**Emphasis added**). '*In the Chamber's view, the Statute unequivocally places an obligation on the Court* ***to take all protective measures necessary*** *to prevent the risk witnesses incur on account of their cooperation with the Court. That is the one and only appropriate interpretation of article 68 of the Statute, which is a framework provision on the matter. Furthermore, although rule 87 of the Rules and regulation 96 of the Regulations of the Registry do not state so explicitly,* ***a logical and joint reading of these two provisions supports the view that the role of the Court is restricted to protecting witnesses from the risk they face on account of their testimony****.'*(**Emphasis added),** *Prosecutor –v- Germain Katanga & Mathieu Ngudjolo Chui*, Decision on an *Amicus Curiae* application and on the "*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile*" (articles 68 and 93(7) of the Statute), Decision of 9 June, 2011, ICC-01/04-01/07-3003-tENG 16-06-2011 1/40 CB T, per Judges Cotte, Diarra and Wyngaert, *para* 61, http://www.icc-cpi.int/iccdocs/doc/doc1093334.pdf, last accessed on 03 July 2015.

1658 *Ruto & Sang* Case, Decision of 18 January, 2015, *Ibid*, paras 29-30.

5.6.2 Participants' Perspectives[1659]

It is argued here that there is need for a balancing of interests in the procedure. The weight that the ICC attaches to the personal testimony of a witness must be examined. It may be a testimony that is morally questionable, problematic and unsustainable.[1660] There may be intentional false testimony[1661] or manipulation by third parties.[1662] Therefore, it is only logical for the participants to accept the realities of the political need for the implementation of witness protective measures without serious disruption of other legal values and duties. The negotiating history of the Rome Statute clearly demonstrates the gap-filling and judicial policy-making responsibility that the framers envisaged would be the prerogative of future decision-makers.[1663] Such realities guarantee the Rome Statute–in-action,[1664] recognising the fact that at times relocation of witnesses is a first and not a last measure of resort. This should at all times be implemented regardless of the fact that such a measure is intrusive on a witness. Moreover, the participants must realise that international justice is never an exclusive objective but one within an arena of negotiation involving, amongst others, recalcitrant states.[1665] Therefore the encouragement of constructive and successful negotiations should always be emphasised in the fast changing world of protective measures.

5.6.3 Strategies employed[1666]

1659 See, *infra*, Chapter 2

1660 Findlay, M, & Ngane, S, (2012) Sham of the Moral Court? Testimony sold as spoils of War, 1(1) Global Journal of Comparative Law, pp.73-101.

1661 Cryer, R, (2003) Witness evidence before international criminal tribunals, 2(3) Law and Practice of International Courts and Tribunals, pp. 411-439; *see also* Ngane, S, (2013) Should States Bear the Responsibility of Imposing Sanctions on its Citizens who as Witnesses Commit Crimes before the ICC? in Findlay, M & Henham, R (Eds.) Exploring the Boundaries of International Criminal Justice, Surrey, Ashgate, p.129.

1662 Buisman, *Op. Cit*, pp.30-31.

1663 Wessel, J, (2006) Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication, 44 Columbia Journal of Transnational Law, p.386.

1664 Arsanjani, M, & Reisman, W, (2005) Law-In-Action of the International Criminal Court, 99 American Journal of International Law, p.385.

1665 Punyasena, W (2006) Conflict Prevention and International Criminal Court: Deterrence in a Changing World, 14 Michigan State Journal of International Law, p.57.

1666 See, *infra*, Chapter 2

It is recommended that the ICC should be strategic in effecting witness protective measures. There should be a review of how the protective measures are determined and executed. Every decision-making role played by Chambers, OTP, Defence and VWU needs to be closely scrutinised. Further, the laws and procedures that govern their *modus operandi* need to be reconsidered. This should include multiple and *ad hoc* mechanisms that organs create when their witnesses have been denied admission into the ICCPP.1667 States parties, not NGOs, should be central to cooperation arrangements including the laws and regulations that guide national institutions. Coordinated mechanisms among ICC organs and international cooperating partners should provide an effective protection system that remains lawful and fully consistent with the regulations.1668 Therefore, the ICC should make strategic and authoritative decisions that embrace policy and purposefully pursue them in order to realise the ambitions mandated by the Rome Statute. Participants in decision-making should be able to prescribe requirements of conduct for both organs and states parties in implementing the protective measures. Further, they should *recommend* or *promote* such prescription so as to minimize risks to witnesses. They should be able to make use of *intelligence* to consider witness circumstances and make *estimates* for future outcomes such as technological advancements, witness interference, psycho-social support and the post-testimony stage. Participants should be *innovative* in justifying protective measures of decisions taken. They should be able to *apply* a decision made and *appraise* such a decision through evaluation and post-testimony follow-ups.

5.6.4 Lessons from Common and Civil Law Jurisdictions1669

It is recommended that the ICC's effective decision-making can become a reality if it draws upon the experiences from the originators1670 and successful implementers1671 of witness

1667 Consideration can go to whether such witnesses indeed requires such protective measures; what impact the measures have on a witness and their due process effect on the accused person; whether there is enough evidence meeting the required threshold.

1668 Higgins, R, *Op. Cit*, p.9.

1669 See, *infra*, Chapter 3

1670 UN, (2008) Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime, UNODC, New York, pp.7-15.

1671 Maynard, W., *Op. Cit*, p.4; *see also* Demleitner, N.V, *Op. Cit*, p.644.

protective measures. These examples come from both common and civil law jurisdictions. Accordingly, both civil and common law jurisdictions considered witnesses to be a major resource that enabled the judiciary to arrive at a conclusion in a case. It is therefore imperative that such witnesses come to court with full conviction and sense of duty.1672 As such, institutions that advance witness protective measures in civil and common law jurisdictions have always had strategic cooperation and mutually coordinated respect for each other. 1673 Despite having different roles within a particular criminal justice system, successful criminal prosecution is paramount1674 and can only be attained if the justice processes1675 give no special interest or status to a particular section or organ. Further, there is need for the realization and protection of every witness regardless of their circumstances and criminal inclinations. In any community, law is not just about rules.

The challenges facing ICCPP have to a large extent also been experienced by decision-makers within common and civil law jurisdictions. Questions about the overlap of organ responsibilities, for example, have been a challenge in such jurisdictions.1676 Further, there have been attempts to consider removing bureaucratic and slow admission processes.1677 Another challenge has involved attempts towards improving surveillance for witnesses including prompt and immediate relocations options.1678 Provision of alternative options for protected witnesses such as new identifying documents, paid work and subsistence resources have also been considered by civil and common law jurisdictions. 1679 It is thus recommended that the maintenance of uniform decision-making processes for purposes of clarifying and securing common interests should be one of the main objectives of the Court.

1672 Tomz, & McGillis. (1997) Serving Crime Victims and Witnesses, U.S. Dep't of Justice, 2 (2d ed.), p.2.2.

1673 Fyfe, N.R. & McKay, H., *Op. Cit,* p., p.675; Allum, F, & Fyfe, N, *Op. Cit,* pp.92-102.

1674 Slate, N.R, *Op. Cit*, p.20.

1675 *Piemonte –v-United States*, 367 U.S.556, 559, n.2 (1960).

1676 Riley, *Op, Cit,* pp.270-271; *see also* Goldstock, R.& Coenen, D.T(1980) Controlling the Contemporary Loansharks: Law of Illicit Lending and the Problem of Witness Fear, 65 (2) Cornell Law Review, pp.206-208; Levin, J.M, *Op. Cit*, p. 208; Krasno, *Op. Cit*, p. 469.

1677 *Ibid.*

1678 *Ibid.*

1679 *Ibid.*

Witness protection needs to become a central tool for successful prosecutions and for fighting impunity. There should be deliberate efforts towards inclusive interests for collective impact towards the amelioration of witness circumstances.1680 There is need for a strengthened follow-up mechanism with a proper grounding in law and policy. There should be a balanced and minimal limitation on the freedom of association including relatives and friends, freedom of movement, participation in the common occupations of life and liberty of witnesses relocated or admitted into the ICCPP.1681 Further, a clear and complete checklist that assesses minimum core requirements for admission into witness protection programs should be clearly promulgated.1682 Lack of a proper checklist only leads to decision-makers with obviously different observational standpoints and perspectives who may develop varied interpretations. As such a properly enforced checklist promotes uniformity within the ICCPP. Policy considerations and factor processes should comprise, but not be limited to, the need for a balancing effect, i.e. ICCPP balancing between the rights of protected witnesses and those of the community at large.1683 Further, such balancing effect to the host community must consider the nature of the evidence and how it affects the trial, the witness family, employment history and any available criminal record.1684

The significance of the testimony (including the summary of such a testimony) of the witness is also important. Decision-makers can also take into account the availability of any other prospective witnesses with similar testimony. The degree of a threat to a witness under consideration and possibilities of interference will have a huge bearing on the likelihood of

1680 Fundamental rights and personal autonomy relinquishment, though a factor process should never be the underlying consideration for the attainment of witnesses' health, safety and welfare; *see also* Anderson,J.R & Woodard, P.L, *Op. Cit*, pp.234-243.

1681 Strategies for balanced limitation should make sure that the limitations do not in any way lead to their further vulnerability. Isolation can at times also lead to vulnerability. However, lessons from common and civil law jurisdictions point to limited contact with witnesses' former life so as to increase their security and protection of their newly found identity.

1682 Fyfe, N., & McKay, H., *Op. Cit*, p. 280; Pesce, T.A., *Op. Cit*, p.1417.

1683 This is likely to preserve community order. A good example is states parties where witnesses have been relocated. Prime consideration should always go to the mandatory risk assessment to states party being requested to host such witnesses.

1684 Past trends in witness protection have at times pointed to witnesses with a criminal record committing crimes while they are in the protection program. This has to an extent affected the communities where the witness has been relocated.

admission into the ICCPP. Inquiry into the kind of persons connected to such a witness will also help in forming a decision on admission into the ICCPP.1685 Considerations of whether there are any relocation recommendations, witness's views (including his or her family)1686 as regards relocation and availability of prospective relocations destinations will help the decision-makers easily form an admission opinion on a vulnerable witness.1687 The success of the trial, including protection of witnesses is fully dependent on the full cooperation of such witnesses. Decision-makers can also take into account assets and liabilities, if any, of a witness.1688 The estimated appearance date for witness testimony can help a decision-maker form an opinion on what sort of protection should be availed to such a vulnerable witness. Decision-makers should also take into account other protected witnesses connected to the same trial. Keeping these witnesses in the same location will only make them more vulnerable and exposed. If there are any medical problems within the family of the witness, these should be fully considered by the decision-maker.1689 Parole restrictions and plea bargaining options should be taken into account when dealing with infiltrated witnesses.1690

Finally, decision-makers should also bear in mind estimated monetary1691 and social welfare needs for the vulnerable witnesses. Appraisals as regards technological changes, cooperation challenges and post-testimonial circumstances should always inform the ICC decision-

1685 Kind of relationship they have with the witness, names, dates and places of birth.

1686 An inclusive approach to decision making always has a collective impact. Geographical relocations concentrated on values and culture have always been a good recommendation for purposes of easy blending in of witnesses. Further, large families have always had a chance of being relocated or protected because their exclusion puts the main witness in danger; Fyfe, N.R, & Mckay, H., *Op. Cit*, pp. 85 -86; Abdel-Monem. T., *Op. Cit*, pp. 1250–1255; Fyfe, N., & Smith, K., *Op. Cit*, pp.450–465; Varese, F., *Op. Cit*, pp.411-444.

1687 Possible timelines in such temporary relocations.

1688 Real and personal property, debts, alimony, child support.

1689 Such as their psychological well-being; Montanino, F., *Op. Cit*, pp.500-528.

1690 It is suggested that such an approach of employing plea bargaining options for infiltrated witnesses has been successfully included in national laws; *see* Serious Organised Crime and Police Act, 2005 UK (SOCPA), Witness Protection, Witness Immunity and Plea–Bargaining issues in it, http://www.legislation.gov.uk/ukpga/2005/15/notes/contents, last accessed on 17 July 2015.

1691 It is important that the ICCPP realises the standard of living for such a witness. Thus there is no way the ICCPP can offer standard of living which is less than what such witness had before joining the program.

making to enable it to broaden the range of protected persons.1692 When in temporary safe houses, there should be less contact with an agent responsible for such witnesses. However, an emergency contact procedure should always be available. Less contact with an agent in both civil and common law jurisdiction has proven to provide more protection to the witnesses.1693 Contact persons from national protection agencies, working in consultation with the ICC officials, should always have skills and up to date trainings in law, psycho-social support and counselling to enable newly protected persons to settle quickly. Further, such agents should have no idea who the witness is and what case they are testifying in. Contact can only be through a unique code.1694 An MOU that a witness signs with ICCPP should comprise, *inter alia*, rights and duties for such a witness towards the outside world.1695 Those who do not comply should be withdrawn from the protection program.

Just like national jurisdictions, proper accountability measures for the VWU will enable it to maintain high standards. 1696 There is therefore a need for constant review of the circumstances justifying amendments, modifications and, ultimately, termination to witness protection in the fluid environment in which decision-makers and participants operate. Further, states parties should be held accountable for their non-cooperation as regards witness protective measures. Through an amendment or liberal interpretation of Article 112(4) of the Rome Statute on ASP, states parties can be held accountable for their non-cooperation. A Witness Protection Committee (WPC) can be formulated from among the ASP.1697 This can be modelled in the same form as the state party reporting mechanism under the UN human

1692 Include families.

1693 Montanino, F., *Op. Cit*, pp.500-528.

1694 Although witnesses are self-sustaining in new environment, when suspect danger need agent contact, who has no idea of witness background nor case he testified.

1695 No contacts with old friends or relatives, no drugs, no talk of past, birth, common names or associates. Assistance expected needs to be expressly spelt out in order to avoid blackmail from witnesses later such as demanding more money. Further, post-trial period contact should be spelt out that it will be on a greatly reduced interval.

1696 Allum, F., & Fyfe, N., *Op. Cit*, p.98; Australia, Canada and US legislations have clear and elaborate accountability mechanisms. Something the ICCPP does not have and what comes before the ASP are generalised reports from the VUW.

1697 This can be a subsidiary body responsible for independent oversight processes for inspection, evaluation and investigation into the purposes of protective measures so as to enhance the operational strategies of the court

rights treaty bodies of the various conventions such as the Convention on the Rights of the Child (CRC)1698 or Universal Periodic Review.1699 This WPC will provide an appropriate platform for the accountability of both states parties and the ICC responsible organs with the Presidency as its chairperson.1700 The rationale behind this suggestion is the fact that the ICC is a treaty based organisation with states parties that should be accountable. For the purposes of implementing procedural protective measures, there should be a balancing of the rights of an accused person and those of witnesses, with judges as unbiased umpires1701 between the prosecution and the defence. It is suggested that if conscientiously pursued, such processes will always support the human dignity of the witnesses and hence the mandate of the ICC. Further, such factors will reduce the incidents of witnesses falling through the cracks as has been the case for the ICCPP.1702

5.6.5 Lessons from international criminal tribunals1703

Apart from the national jurisdictions explained above, a considerable body of jurisprudence emanating from the internationalized tribunals1704 has also provided a good basis for the

1698 http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx , last accessed on 20 July 2015.

1699 http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx last accessed on 20 July 2015.

1700 Rules of procedure, issues, and perspectives should consider clarification and strategic intervention such as: (a) ICC current protection strategies for witnesses; (b) How should 'appropriate measures' be conceived or understood; (c) How can sufficient protective measures be valued; (d) what is the current state of enforcement of protective measures, possible effects on the accused persons and cooperation of states parties and third party states; (e) what are the solutions to creating a secure environment for witnesses; (f) what steps can be taken to promote into reality optimal aspirations of world community about witness welfare? (g) Any corruption challenges within their national institutions; (h) monitor and review progress of confidential agreements with states parties and third party states; (i) review reports submitted to ASP by both ICC organs and states parties on promotion and implementation of protective measures. NGOs can also submit parallel reports on such states domestication as regards witness protection; (j) Submit annual reports to the ASP on its deliberations, findings and recommendations for the promotion of witness protection; (k) review processes for cooperation and implementation of witness protective measures every year.

1701 Adams, C.A, *Op. Cit*, pp.755–756; Darbyshire, P., (2008) Criminal Procedure in England and Wales in Vogler, R., & Huber, B., (Eds.) Criminal Procedure in Europe, p.60.

1702 Evans-Pritchard & Jennings, S, (2014) Action Urged on ICC Witness Protection: Experts Highlight Security Weaknesses that could endanger entire cases, Institute for War & Peace Reporting, https://iwpr.net/global-voices/action-urged-icc-witness-protection last accessed on 17 July 2015.

1703 See, *infra*, Chapter 3

ICC to advance its own non-procedural witness protective measures. According to the court in the *Milosevic*1705 *and Renzaho*1706 *Cases,* the observance of an accused person's fair trial rights, public trial and sufficient establishment of security risks to witness or to his family became central to decision-making for all procedural protective measures. 1707 Further, there is need for flexible considerations to be given to geographical security as observed in the *Milosovec case1708* by the ICTY and in the *Kajelijeli Case1709* by the ICTR. Further, as decided in the ICTY cases of *Tadic,*1710 *Prlic1711* and *Galic,1712* a balancing act is important for the provision of witness protective measures and a need to demonstrate why due process should be departed from in favour of witness protective measures. This will to a greater extent instil confidence in the witnesses as observed by the ICTY in *Vijislav Seselj case.* 1713 Successful implementation of protective measures demanded a deliberate and continuous innovation through a generous interpretation of law and policy. As opposed to the *Rutaganda1714* jurisprudence of the ICTR on the blanket application of witness protective measures, effective implementation that observes due process should be largely on a case by case basis..1715 It is recommended that in order to

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1704 Weber, R.,(2010) Witness Protection at International Criminal Tribunals: Previous Experiences as Lessons for the Extraordinary Chambers in the Courts of Cambodia?, 2(1) City University of Hong Kong Law Review, p.137

1705 *Prosecutor –v- Milosevic*, TC, ICTY IT – 02-54-T, 30 July, 2002, para 5–7, http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/020730.pdf last accessed on 20 July 2015

1706 *Prosecutor –v- Tharcisse Renzaho*, TC II, Case Number ICTR-97–3 -1, 17 August, 2005,

http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Renzaho/decisions/170805.html, last accessed on 20 July 2015.

1707 Article 22 of the ICTY Statute..

1708 *Milosovec Case , Op Cit*

1709 Kajelijeli Case , Op. Cit

1710 *Tadic Case*

1711 *Prlic Case*

1712 *Galic case*

1713 *Vijislav Seselj Case*

1714 *Rutaganda Case*

1715 *Taylor* Case.

establish a viable mechanism1716 for witness protection at the ICC, such a case by case approach should be extended to the disclosure of witness identity or information to the defence.1717 Following the *Aleksoviski1718* case of the ICTY, it is suggested that fair trial process includes fairness to the prosecution, defence and witnesses. As held in *Nteziryayo* case by the ICTR, an objective test as regards application of protective measures would be desireable. It is further recommended that, just like the internationalized criminal tribunals, a centralised operational mode for the implementation and administration of protective measures is a viable alternative as opposed to the current position of VWU within the ICC's decision-making structure.1719 The ICC should be able to employ skilled participants who can competently secure the physical and psychological protection of witnesses even in ongoing conflicts1720 as observed in *Tadic Case*.1721 Such skills should include a dedicated and idealistic approach that can enable them to make responsible independent assessments of witness needs, including the preservation of contacts and location information. Further, ICC policy on accompanying persons should require the greatest care for the psychological welfare of the witness.1722 Serious and considerate steps should be taken to strengthen post-

1716 Stephen, N., (2004) A Viable International Mechanism, 2(2) Journal of International Criminal Justice, p.386.

1717 In order to secure rights of accused persons in relation to trial preparations, factor processes should be able to consider whether: (i) prosecutions were able to request consent to disclose unredacted versions to the defence, (ii) prosecution able to justify why particular persons in redacted version require protective measures and why redaction rules should apply, (iii) such disclosure may prejudice ongoing or future investigations, (iv) may cause grave risk to the security of a witness or his family, or (v) for any other reasons that may be contrary to the public interest or the rights of third parties, the Chief Prosecutor should be able to apply ex parte to the Trial Chamber sitting in camera to be relieved of an obligation under the Rules to disclose the impugned material; *see also* STL practice as demonstrated in *Prosecutor –v- Salim Jamil Ayyash et. al*, Order in Relation to Sabra Motion for Disclosure of a Document, STL-11-01/T/TC, Decision of 16 April, 2015, https://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/3930-f1910 , last accessed on 11 August 2015.

1718 *Aleksoviski Case*

1719 Almost all tribunals bestowed upon their VWUs or Registry the power to implement and run administration of the protective measures. Their VWUs/VWS or Registry ordinarily conducted administrative and judicial functions.

1720 Tolbert, D, & Swinnen, F, (2006) The Protection of, and Assistance to Witnesses at the ICTY in Abtahi, H. & Boas, G.,(Eds.) The Dynamics of International Criminal Justice, Leiden, Martinus Nijhoff Publishers, pp.219-225.

1721 *Tadic case.*

1722 (i) They should only be referred to as witnesses and not victims; (ii) should freely testify and choose who to accompany them on such trips; (iii) such accompanying persons should also be involved in post-testimony period assessment; *see also* Oosterveld, V., (2005) Gender–Sensitive Justice and the International Criminal

testimony assessments such as measures and processes for rehabilitation in the legal, economic and social interests of witnesses.1723 Non-state actors such as NGOs can help strengthen this resolve by pushing and lobbying for states parties' participation, universal ratification and domestication of the Rome Statute.1724 Their operational mechanisms such as the coalition platform, financial leverage and planning, local offices, human resource and skills can help raise awareness and relevance of both ICC and states parties in doing more to improve on post-testimony witness welfare, reduced effects of relocation1725 and cultural shock. Thus the ICC should aim for greater policy coherence for a better and more coordinated approach, consultations and frank disclosure to problems of witness security with all participants. Improved microeconomic planning and fiscal prudence on the part of the ICC will enable better delivery of the protective measures. The experiences of the internationalized tribunals, also with very limited budgets can be used as a guide for the establishment and promotion of a humanitarian approach towards witnesses. 1726 Their approaches towards value for money as regards witness protection should be learning lessons for the ICC decision-makers. Further, there is need to exercise caution as regards victims/witnesses who are so desperate to claim large amounts of reparations through exaggerated testimonies.1727

For the purposes of achieving balanced procedural measures as advocated for in the *Tadic Case* by the ICTY, it is suggested that in the use of video-link technology lessons from the

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Tribunal for Rwanda: Lessons Learned for the International Criminal Court, 12 New England Journal of International and Comparative Law, pp.127-130.

1723 Colliard, C.,(2006) Mental Health in the Wake of War and Terrorism: Lessons From Humanitarian Experience in Victim Rehabilitation in Ewald, U, & Turkovic, K.,(Eds) Large Scale Victimization as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post Conflict Societies, Amsterdam, OIS Press, pp.242–252.

1724 Such as the Coalition for the International Criminal Court.

1725 The process factors for decision-making of a post-testimony security risk should include a verifiable, identifiable and sustainable threat to the witness or his family.

1726 Cockayne, J. (2004-2005) Fraying Shoestring: Rethinking Hybrid War Crimes Tribunal, 28 Fordham International Law Journal, p.673.

1727 For instances experiences from the ECCC; *see also* Leyh, B.M (2012) Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls, 12 International Criminal Review, pp.387-389.

international criminal tribunals are imperative. The ICC should have factor processes that are in the interest of justice1728 and fair to both parties.1729 Video-link technology that allows a witness to be examined by both parties and the Chamber should not require an assessment and authorization before use. Such technology already provides for an appropriate balance as regards cross-examination opportunity to the Defence. Further, the ICC has 'wide discretion to permit evidence to be given by video-conference link as long as the Statute, the Rules, and the rights of the accused are respected'.1730 It is recommended that such interests of justice should be on a case by case basis. A three pronged test used by the STL can be very useful herein, namely: (i) the witness must be unable to have a good reasons to be unwilling to physically come before court; (ii) the testimony of the witness must be sufficiently important to make it unfair to the requesting party to proceed without it; and (iii) the accused must not be prejudiced in the exercise of his or her right to confront such a witness.1731 Video-

1728 *Prosecutor -v- Delaic and Delic*, IT-96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 28 May, 1997, paras 15-18; *Prosecutor-v- Dusko Tadic*, IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June, 1996, para 17; "testimony of a witness by video-link conference should be given as much probative value as testimony presented in the courtroom", *Prosecutor –v- Milutinovic, Sainovic, Ojdanic, Pavkovic, Lazarevic and Lukic*, IT-05-87-T, Decision on the Prosecution Motion for Protective Measures and for Testimony to be Heard via Video-Link Conference, 15 August 2006, para 3; " *evidence may be given directly in court, or via such communications media, including video, closed –circuit television, as the Trial Chamber may order*", *Prosecutor –v- Taylor*, SCSL-03-1-T, Decision on Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link, 30 March 2007, para 25; ICTR allows it without explicit authorising rule, *Emmanuel Rukundo –v- The Prosecutor*, ICTR-2001-70-A, Judgment, 20 October 2010, para 221.

1729 *Prosecutor -v- Salim Jamil Ayyash, Mjstafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra*, General Decision on video-Conference Link Testimony and Reasons for Decision on Video-Conference Link Testimony of Witness PRH128, STL-11-01/T/TC, 25 February, 2014, paras 3-14, https://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/download/3498_1d609499c2aef56c1115f1d19fb58979-f0066, last accessed on 03 May 2016.

1730 *Prosecutor –v- Pierre Bemba*, ICC-01/05-01/08, Decision on the "Submissions on the remaining Defence Evidence" and the Appearance of Witnesses D04-23,D04-26, D04-25, D04-29, and d04-30 via video-link, 15 August 2013, para 9; The ECCC has held that ' [t]he decision of whether to grant video-link testomony is a matter within the broad discretion of the Trial Chamber', Co-Prosecutors –v- Nuon and Khieu, Order for Video-Link Testimony of KHIEU Samphan Character Witnesses TCW-277 and TCW-84, 24 April 2013; Order for Video-Link Testimony of Civil Party TCCP-13, 22 May 2013.

1731 *Prosecutor –v- Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra*, Defense Response to the Urgent Prosecution Motion for Protective Measures for Witness PRH 301 and Video – Conference Link Testimony for Nine Witnesses, STL-11-01/T/TC, 29th January, 2014, http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/motions/4195-f2082 last accessed on 20 July 2015; see also Rule 93(C) of the STL RPE.

conference link testimony can also save the finite financial and logistical resources of the Court.1732 Further to this, it is suggested that in order to reduce the credibility and reliability questions in relation to a particular witness, only a Judge able to observe the demeanour of a witness should be present at an *in camera* hearing. Both the accused person and defence can ask questions *in absentia* and later a redacted transcript handed over to the parties.1733 This is a lesser evil and necessary for the integrity of the trial process and protection of the witness. Just as observed by the ICTR in the *Ndayamabje case*, witness protection is very important and any exceptional circumstances should not override or undermine the protection of witnesses. In order to achieve their aims, international trial procedures should be amenable to evolution so as to adapt to the complex and challenging arena of witness protection.,1734 including enough preparations for the defence as advocated for by the ICTR in the *Akayesu* 1735 and *Nsegimana*1736 Cases.

5.7 Conclusion

Witnesses are a crucial element to the ICC practice.1737 They actually play a critical role in any trial before the chambers. These witnesses need to be given assurances of both physical and psychological safety. As has been argued in Chapter 4,1738 prosecutions before the ICC are always riven with complexities, making the fulfilment and implementation of protective measures problematic. Procedural measures face fair trial challenges. Non-procedural measures are always affected by, *inter alia*, the circumstances of the witnesses

1732 *Prosecutor -v- Salim Jamil Ayyash, Mjstafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra*, Decision on Prosecution Authorising Video-Conference Link Testimony for Witness PRH688, STL-11-01/T/TC/F2285/20151023/R279472-R279475/EN/af, Decision of 23 October, 2015, para 5, http://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/4480-f2285, last accessed on 03 May 2016

1733 *Prosecutor –v- Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra*, Decision of 29th January, 2014, *Op. Cit.*

1734 DeFrancia, C. (2001) Due Process in International Criminal Courts: Why Procedure Matters, 87 Virginia Law Review, p.1410; such flexibility and innovation should include exit strategies for witness protection measures, see, Tortora, G. (2010) The Special Tribunal for Lebanon and Discussion of Residual Mechanisms, 104 Proceedings of the Annual Meetings (American Society of International Law) , pp.45-47.

1735 *Akayesu Case*

1736 *Nsegimana Case*

1737 Groome, D, (2014) No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations, 3(1) Penn State Journal of Law & International Affairs, p.1.

1738 See, *infra*, Chapter 4 generally.

themselves,[1739] technological mechanisms, cooperation processes, [1740]financial strategies and generally decision-making. This chapter has considered appraisals, alternative solutions and recommendations in the global common interest for a holistic, constructive and innovative protection for ICC's witnesses.

This Chapter has proposed a number of recommendations intended to help establish the delicate balance necessary for the *interpretation of the l*aw and policy on witness protection. Such interpretation should mirror law and policy on the core values of the ICC witness protection system. Further, it has been recommended that the OTP, Chambers, VWU and Defence need to properly *balance their roles as organs* in ICC's witness protection. Such a balance should reflect fairness to all parties and the best interests of justice *i.e.* interests of the witnesses, victims and accused persons. *Resources* allocated towards witness protection need to be increased. Further Special Relocation Fund (SRF) should be complementary to national systems of protection. Witness circumstances such as detention, polygamy (including those with large extended families) and infiltrated or an insider witnesses should have special consideration in decision making for witness protection. *Cooperation* among the organs of the ICC, among states parties to the Rome Statute, NGOs can go a long way in effectively negotiating relocations and protection for witnesses. For instance, as advocated for in *Ndayambaje1741* and *Nyiramusuhuko1742* cases by the ICTR, international cooperation and judicial assistance are very important as regards international criminal justice and as such it is the prerogative of the host state to accord or deny protection to refugee witnesses. Further, the ICC witness protection system should be able to innovatively embrace *technology* as regards distant testimony and protection of witnesses. These suggested recommendations regarding decision making processes for ICC witness protection reflect policy content, perspectives and experiences from common and civil law jurisdictions, and practice from the international criminal tribunals.

1739 Being infiltrated witnesses, detained witnesses, victims/witness status, family obligations if it is a big family such as polygamous family.

1740 Both international and internal cooperation.

1741 *Ndayambaje Case*

1742 *Nyiramusuhuko Case*

CHAPTER SIX

6.1 CONCLUSION

Witnesses are an integral part of ICC legal framework. According protective measures[1743] to them preserves the Court's essential testimony. Further, such protective measures enable the provision of physical security, psycho-social support to individuals and the preservation of the Court's integrity and success of the Court's judicial process. When considering such protective measures, ICC's decision-making processes need to take into account the appropriate balance between witness needs and the rights of an accused person. In addition, decision-makers should consider the interpretation, applicability and implementation of both policy and law that can secure the overall goals of the ICC. Despite the availability of the Court's witness protection system, its mechanisms are not yet working effectively. The Court faces numerous interpretational, applicability and implementation challenges ranging from lack of coordination, uncertainty and confusion among its organs, namely the OTP, VWU, the Chambers and Defence; interpretation of the concept of 'appropriate protective measures'; states parties' cooperation and relocation of witnesses with a particular profile, namely infiltrated or insider witnesses, incarcerated witnesses and polygamous witnesses.

Promotion of witness protection as a strategic choice[1744] by all ICC decision-makers will positively contribute to the fulfilment of the Court's obligations. As discussed in this thesis, the Court's current policy formulation and legal interpretation does little to address the reality of witness protection challenges on the ground. Witness protection practice has not only led to policy ambiguity but also put vulnerable witnesses at risk. Continuous allegations of harm, large-scale intimidation, corruption and interference to witnesses are seriously undermining

1743Both procedural and non-procedural measures. As indicated in Chapter 1 and reasons therein, this work only discusses non-procedural measures at the ICC.

1744 Land, M, (2013) Reflections on the New Haven School, 58 New York School of Law Review, pp.919-920.

the Court's integrity leading to, *inter alia*, collapse of cases 1745 and prosecutions for offences against the administration of justice.1746 Further, attempts by the OTP to request the Trial Chamber (TC) to allow the admission of prior recorded testimony in place of *viva voce* evidence pursuant to Rule 681747 is a conspicuous sign that the current protection mechanism is not working very well. This justified the need for the current research into reconsideration of the whole ICC witness protection process. This research gap presented the opportunity to analyse the witness protection system at the Court and suggest possible alternative solutions.

This thesis has endeavoured to explore both contextual factors and legal criteria relevant to the present state of the ICC's witness protective measures. In analysing the highlighted challenges of the ICC witness protection system, the thesis has explored opportunities for legal and policy reform from the theoretical framework of policy oriented jurisprudence. As articulated in Chapter two, international law should be contextually understood as a decision-making process. Therefore, there should be a possibility of the ICC's policy goals being shaped in a way that can achieve particular values. Such values should be those that can attain humanity. Through policy oriented jurisprudence's specific method of inquiry, the thesis has analysed ICC witness protection decision making process. This has been through an analysis of past and current trends, and alternative recommendations for future decisions regarding ICC witness protection practice.

1745 See generally, *Kenyatta Case*, Decision on the withdrawal of charges against Mr Kenyatta, *Op. Cit*; *Samuel Ruto & Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, *Op. Cit*.

1746 *Jean-Pierre Bemba Gombo, et. al*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Op. Cit*;. *Walter Osapiri Barasa Case*, Warrant of arrest for Walter Osapiri Barasa, *Op. Cit*; *Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute", Op. *Cit*.

1747*Prosecutor –v- William Samoei Ruto and Joshua Arap Sang*, Public With Confidential Annexes A1-A2, C1-C12, D1-D2 and Confidential, EX PARTE, available only to OTP and VWU, Annexes Bl-Bll, D3, Public redacted version of "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses", 29 April 2015, ICC-01/09-01/11-1866-Conf + Annexes, ICC-01/09-01/11-1866-Red 21-05-2015 1/46 EK T, 21 May, 2015, *paras* 63-128, http://www.icc-cpi.int/iccdocs/doc/doc1979994.pdf , last accessed on 27 October 2015.

Chapter One introduced this research. It outlined the challenges of the ICC's non-procedural witness protective measures. The Chapter further advanced the rationale for the research approach and choice of methodology. The Chapter concluded with a logical structure for the thesis. Chapter Two of this thesis sought to justify the policy oriented theoretical approach to international law. It analysed what this approach is all about and highlighted its weaknesses and strengths. In the end it advanced the argument that, despite its shortfalls and other existing theoretical approaches to international law, the approach centred on policy oriented jurisprudence has the potential of analysing the underlying intention of the Rome Statute regarding witness protective measures through its mapping process or framework of inquiry. 1748 Such a framework, it was shown, can aid decision-makers' work more effectively towards the goals and values of the ICC. For instance, the formulation of policy, interpretation of the law, and implementation of the measures ordered by the Chambers. The Rome Statute should be able to properly serve human beings. Clearly, the idea of decision-makers being able to consider the consequences of their choices is not unique to the adherents of policy oriented jurisprudence.1749 Nonetheless, this thesis has argued1750 that the current ICC practice of interpreting the law minimizes the potential that policy can achieve in decision-making.1751 The Rome Statute is much broader than just rules. In the words of Reisman, law should be interpreted in such a way that undertakes to improve the performance of decision processes.1752 Pursuant to this framework of inquiry, it has been suggested that adoption of a policy oriented approach to the ICC's witness protection system can assist in finding innovative solutions and help to overcome the current challenges to the ICC's witness protection system.1753

1748 Wiessner, S, *Op. Cit*, 81(1) Asia Pacific Law Review, p.45.

1749 Land, *Op. Cit*, p.920.

1750 See *infra*, Chapters 2 & 4.

1751 Relegating what policy to be adopted to secondary status, limiting its contextual use and carrying little authority.

1752 Reisman, M, W *et. al*, *Op. Cit*, 32 Yale Journal of International Law, p.576.
1753 See Chapter 5.

Further to this framework of inquiry, Chapter Three of this thesis examined the past trends of decision-making as regards witness protection. It analysed the genesis of witness protection, its rule development and experience within national criminal justice systems.1754 It further analysed the rule development on the international platform, namely the internationalized criminal tribunals. Consideration in this discussion has gone to the non-procedural protective measures and their shortfalls in both national and international justice systems. Overall, it has been shown that witness protective measures have been interpreted by national courts and international criminal tribunals as a balancing effect between the well-being of witnesses and fairness to both the witnesses and accused persons.

McDougal and Lasswell have argued that appraisals of past trends can help decision-making and inform problem-oriented inquiry to current challenges.1755 Thus Chapter Four explored the ICC's witness protection including its decision-making trends, practices and strategies. This ranged from literature resource to data information obtained from fieldwork. In this chapter it was argued that, contrary to predecessor tribunals, the ICC's decision-making developments mirror an extension of the spirit and process of 'socio-cultural identities' of states parties.1756 The ICC witness protection system operates in an international arena that requires cooperation from varied states parties with their own national interests. However, the ICC witness protection system within the Rome Statute and its ICC RPE is a reflection of collective interests of the world community of states parties. Such community interests include the amelioration of witness circumstances balanced with the rights of an accused person, 1757 and cooperation as regards implementation of non-procedural protective measures. Factors for consideration in securing witness protection have been identified as

1754 Specific national criminal justice systems that have well nuanced witness protective measures have been discussed from both accusatorial and inquisitorial systems of justice.

1755 Lasswell, H.D. & McDougal, M.S, (1975) The Relation of Law to Social Process: Trends in Theories about Law, 37 University of Pittsburgh Law Review, p.465.

1756 Mariniello, T. (2015) One, no one and one hundred thousand: Reflections on the Multiple identities of the ICC in Mariniello, T. (Ed) *Op. Cit*, pp.1-2.

1757 *See generally* Zappalà, S, (2000) The Rights of the Accused, in Cassese, Gaeta, Jones (Eds.), The Rome Statute of the International Criminal Court: A Commentary, Vol. 2, Oxford, OUP, pp.1319-1328.

including the interests of an accused person1758 and the personal circumstances of witnesses in the form of age, gender, well-being, special recognition for certain crimes such as those involving sexual violence, gender violence and violence against children.1759 It was further highlighted in Chapter Four that the ICC's *travaux preparatoires* had more focus on procedural measures with little or less focus on the non-procedural measures as a logical end of all protective measures.1760 This has to some extent led to the challenges of implementing the witness protective measures. The Chambers, OTP, VWU and Defence have adopted varied interpretations regarding the legal and policy framework, leading in some cases to misunderstandings and serious litigation among them. Such misunderstandings and litigation have focused on boundaries of organ responsibilities regarding these protective measures. 1761 Further, the conduct of the VWU has been put to question. 1762 Its understanding of the law in relation to issuing, enforcing and ordering protective measures has been inconsistent with the ideals of the Rome Statute. 1763 Further, the VWU has provided limited attention to Defence witnesses as opposed to those of the OTP when it comes to implementation of protective measures. This has been interpreted as evidencing biased attention affecting the right to a fair trial for the accused person.1764 Contrary to expectations of neutrality towards all witnesses, there have been allegations that OTP witnesses have been shown substantial favour compared with defence witnesses. As a result, defence witnesses have not benefitted much from the witness protection system. Another issue that has been highlighted in this Chapter is the lack of post testimonial follow-up for witnesses. Witnesses are made aware of how the protection system operates including

1758 *Ibid.*

1759 Whiting, Law and Contemporary Problems, *Op. Cit*, p.182; Article 68 of the Rome Statute.

1760 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN General Assembly (GA) Doc. No. A/51/22, para. 181, 50th Session, Supp. No.22.

1761 *Katanga & Ngudjolo Case*, Case No. ICC-01/04-01/07-776, 26th November, 2008, *Op. Cit*, per Dissenting Opinion of the Judge Georghis Pikis and Judge Nsereko, *para* 15.

1762 Tolbert, D., (2008) Article 43 in Triffterer, O. (Ed.), *Op. Cit*, Munchen, Hart, p.989.

1763 See Chapter 4 Discussion.

1764 See Chapter 4.

logistical issues, psycho-social services and the personnel handling them.[1765] However, existence of minimal post-testimonial follow up can have a huge effect on some witnesses as they feel abandoned.[1766] The limited resources of the ICCPP hugely contributes to the shortfalls in post-trial follow-ups. The discussion on ICCPP process of assessment and admission of witnesses highlighted security risks and individual circumstances. It was noted that, within the ICC, there is no synergy as to qualifying indicators for protection among the organs. The OTP, Defence and VWU all seem to have varied considerations of who qualifies for the ICCPP.[1767] It was noted that this is self-defeating as it causes risks to witnesses[1768] A further lack of synergy regarding security risks is noted in approaches among the NGOs collaborating with the ICC and national institutions.[1769]

A trend description of the ICC's witness protection system further touched on critical issues concerning the treatment of witnesses with a particular profile. These are detained witnesses, polygamous witnesses and infiltrated witnesses. Their effective relocation strategies and cooperation of states parties has proved a huge challenge. The processes followed by the

1765 *Prosecutor –v- Pierre Bemba,* Case No. ICC-01/05-01/08-T-151-Red-ENG CT WT 01-09-2011 1/78 WN T, Witness: CAR-OTP-PPPP-0178, transcript page 3, paras 19-21 http://www.icc-cpi.int/iccdocs/doc/doc1655683.pdf#search=Bemba%20case%20airport , last accessed on 28 October, 2015.

1766 Berkeley Report, *Op. Cit*, pp.38-54.

1767 See *infra*, Chapter 4, section 4.2

1768 *Prosecutor -v- Abu Garda* (Decision Ordering the Prosecutor to Submit a Report on Witness' Security Risk Assessment), ICC-02/05-02/09-41 (30 July 2009), p.5, http://www.iclklamberg.com/Caselaw/Sudan/Garda/PTCI/41.pdf last accessed on 28 October 2015; see also *Prosecutor -v- Abu Garda,* Prosecutor's Report on Witnesses' Security Risk Assessment with Confidential, Ex Parte, Prosecution and VWU only Annex A, http://www.icc-cpi.int/iccdocs/doc/doc720302.pdf , last accessed on 31 December 2014; *Prosecutor –v- Thomas Lubanga Dyilo* (Transcript of Status Conference), ICC-01/04-01/06-T-74- Conf-Exp-ENG (12 February 2008) quoted in Prosecutor –v- Lubanga (Decision on Responsibilities for Protective Measures), ICC-01/04-01/06-1311 (24 April 2008), paras. 35 & 56, http://www.icc-cpi.int/iccdocs/doc/doc751763.pdf , last accessed on 30 December 2014; see also Regulations of the Registry, Regulation 95 (Protection arrangements), http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/282891/RegulationsRegistryEng.pdf last accessed on 28 October 2015.

1769 *Prosecutor –v- William Ruto & Joshua Arap Sang,* ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, Dated 17th April, 2014, http://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf (last accessed on 28/10/2015); Mathenge, O, & Musau, N. (2014) ICC Witness in Ruto Case Disappears, http://www.the-star.co.ke/news/article-167324/icc-witness-ruto-case-disappears , last accessed on 28 October 2015.

Court when it comes to securing relocation agreements need to be re-evaluated. ICC decision-makers need to first understand the national legislation of prospective requested states parties before arranging witness relocation agreements. Through such an approach, it has been suggested (in Chapter Four) that ICC decision-makers would be able to understand that, despite having obligations under the Rome Statute, domestic statutes have a huge bearing on decisions of government officials. Such statutes will inform their opinion on whether or not to host infiltrated witnesses, polygamous witnesses and cooperation commitments on detained witnesses.1770 Chapter Four sums up the trends and practices of witness protection with challenges of financial resources. The budgets on which the Court operates make it difficult for it to fulfil its obligations.1771 Further, lack of clear demarcation between the allocations to witnesses and victims' processes (excluding the Victim Reparations Fund) make the plight for witnesses even more critical.1772 It was therefore concluded that, with such an operational budget, it has become very difficult to secure the much needed resources for the fulfilment of the witness protective measures.

Policy alternatives can be used to recommend solutions to a problem.1773 Lasswell and McDougal argue that such policy alternatives act to promote the comprehensive goals of a particular community.1774 Most importantly, such policy alternatives should be for the good of humanity.1775 This thesis has considered the 'good of humanity' with an expansive and widespread interpretation1776 rather than a limited and narrow clarification of needs for vulnerable witnesses. Pursuant to this, Chapter Five provides a list of practical

1770 Yabasum, D, & Holvoet, M, International Criminal Law Review, *Op. Cit*, pp.725-745.

1771 Ford, Saint Louis University Law Journal, *Op. Cit*, p.954.

1772 See *infra*, Chapter 4.

1773 Lasswell, H.D, & MacDougal, M.S, Jurisprudence for a free society: studies in law, science, and policy. Vol. 1, *Op. Cit*, pp.1033-1035.

1774 Lasswell, H, & McDougal, M, S, *Op. Cit*, 44 Southern California Law Review, pp.362-363.

1775 Lasswell, H, (1961) The Interplay of Economic, Political and Social Criteria in Legal Policy, 14(2) Vanderbilt Law Review, p.452.

1776 Lasswell, H.D, & Kaplan, A. (2014) Power and Society: A Framework for Political Inquiry (With a New Introduction by Ronald D. Brunner), New Brunswick, Transaction Publishers, pp.vii-viii & p.215; McDougal, Yale Law Journal, *Op. Cit*, p.915.

recommendations as an original contribution of this work to the ICL discipline. As summarised below, this work therefore recommends alternative solutions to the ICC witness protection problem. ICC actors, participants and decision-makers should innovatively embrace suggested factor processes, termed *'protective codes'*, in order to overcome current challenges to the witness protection system. It has also been highlighted that categories for these protective codes are not closed. These protective codes are in form of fairness, welfare, resources, cooperation, technological leverage and awareness, capacity, integrity and dependability.1777 Therefore, a good faith interpretation1778 of the Rome Statute, the ICC RPE – against the background of the *travaux préparatoires* – will help articulate these suggested protective codes for the greater good of vulnerable witnesses and the objectives of the Court. As opposed to Rome Statute amendments, flexible and generous interpretation of the protective measures' policy formulation, legal regime and implementation will only strengthen the cause and resolve of the ICC. The Court is a broader network mechanism for attaining the goals of international criminal justice. Its actors and decision-makers should therefore be catalysts 1779 for inspiring national witness protection programs that can enhance the rule of law and plausible interest among states parties.

In promoting such flexible and generous interpretation, it has been suggested in Chapter Five that, instead of reassessing and reconsidering requests for protective measures, both VWU and Chambers should endorse requests from the OTP and Defence for their witnesses. Reconsideration and assessment should only go to requests that are contentious. Further to

1777 Or reliability; Protected witnesses will always have faith within the system. Thus to what extent do actors or decision-makers emphasize the pursuit for power outcomes that secure such loyalty and trustworthiness in the system? Witnesses need to build confidence in the system and if it fails to protect witnesses at risk, no loyalty can be realised.

1778 Article 31(1) of the Vienna Convention on the Law of Treaties of 23 May, 1969. This Vienna Convention expressly states that "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object of its purpose.";* Jonas, D, & Saunders, T. (2010) The Object and Purpose of a Treaty: Three Interpretive Methods, 43(3) Vanderbilt Journal of Transnational Law, pp.565-609; *Territorial Dispute (Libya Arab Jamahiriya/Chad)* Judgment, I.C.J. Reports 1994, p.6, 27.

1779 McAuliffe, P, (2013) Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship, New York, Routledge, pp. 213- 214; Boulos, M, (2013) A Positive Impact Derived From ICC Investigations in African Countries: Catalyzing the Development in Domestic Legal Systems, ICC Forum, 29 March, 2013, http://iccforum.com/forum/permalink/91/1194 last accessed on 30 October 2015.

this, the Defence should be able to have sufficient capacity for the protection of its own witnesses in the same way that the OTP protects its witnesses upon refusal of the Chamber to order non-procedural protective measures. Witnesses with a particular profile need to be accorded special attention. It has been suggested that incarcerated witnesses should not be relocated to The Hague. Video-link technology can be a useful tool for their testimony within the jurisdiction of the detaining country. However, there should be proper strategies for monitoring the fulfilment of protective measures and humane treatment within their custody facilities. This can be achieved through collaboration of the ICC actors, collaborators and detaining states parties. When negotiating relocation agreements for infiltrated witnesses, priority should always go to states parties that have domestic legislation that can accommodate plea-bargaining strategies. Polygamous witnesses should always be relocated to states that are similarly and geographically situated. This will enable them to easily blend within a community that is not much different from their original country. Actors and decision makers need to learn from the practice in inquisitorial and accusatorial systems of justice as regards relocation of large and extended families1780 such as the mafia.1781

The protection of witnesses has become a decisive and integral part of the ICC system. Just as Mahony argues, it is crucial to the integrity and success of the ICC's judicial process.1782 However, its *sui generis* character within the ICC system demonstrates a Court that is operating in uncharted waters with little or no common practice to rely on.1783 Therefore,

1780 Abdel-Monem,T, American Criminal Law Review, *Op. Cit*, pp.1250-1255 on foreign national in the US WITSEC.

1781 Fyfe, N.R, *et.al*, Transactions of the Institute of Geographers, *Op. Cit*, pp.85-86 on forced migration and resettlement of witnesses in Britain; Varese, Law and Society Review, *Op. Cit*, pp.411-444 on migration of the Ndrangheta Mafia Family in Northern Italy.

1782 Mahony, *Op. Cit*, p.1.

1783 Evans-Pritchard, B, & Jennings, S, (2014) Action Urged on ICC Witness Protection, Institute for War & Peace Reporting, 28 March 2014, https://iwpr.net/global-voices/action-urged-icc-witness-protection last accessed on 30 October, 2015; Irwin, R, (2009) Q & A with Thomas Lubanga's Defence Lawyer, Catherine Mabille, International Justice Monitor, 24 September, 2009, http://www.ijmonitor.org/2009/09/qa-with-thomas-lubangas-defense-lawyer-catherine-mabille/ last accessed on 30 October 2015; Global Justice (2015) Is Enough Being Done to Protect ICC Witnesses? Global Justice, 18 May, 2015, https://ciccglobaljustice.wordpress.com/2015/05/18/is-enough-being-done-to-protect-icc-witnesses/ last accessed on 30 October, 2015; Wakabi, W, (2015) Judges Decline to Shield Witness From Public View During

witness protective measures processes should always adapt to ever challenging environments without hurting the credibility of the Court as a legal institution. In line with Koskenniemi's proposition, participants need to realise that a pure application of international criminal law is ultimately a political goal rather than one that is legal in nature1784 whereby institutions such as the ICC mirror fragmentation of international law and the emergence and operation of structural bias.1785 The ICC is a specialised institution of international criminal law calling for special audience with special interests and goals.1786 Flaws1787 within the ICC witness protection system need to be continuously appraised in order for the system to improve. International criminal justice is a phenomenon grounded in power, yet simultaneously capable of transcending it.1788 Thus, the ICC's actors, participants and decision-makers should strive towards the betterment of vulnerable witnesses.

This research has articulated alternative values and conceptions of witness protective measures that the ICC's decision-makers can contemplate. Essentially, the thesis has suggested that the Court's witness protective measures policy formulation, legal interpretation and implementation should at all times be a maximization of access by all

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Testimony, International Justice Monitor, 23 October, 2015, http://www.ijmonitor.org/2015/10/judges-decline-to-shield-witness-from-public-view-during-testimony/ last accessed on 30 October, 2015.

1784 Koskenniemi, M, (1990) The Politics of International Law, 1 European Journal of International Law, p.6.

1785 Koskenniemi, M, (2009) The Politics of International Law – 20 Years Later, 20(1) European Journal of International Law, p.9.

1786 *Ibid.*

1787 When Ocampo was asked by Radio Netherlands Worldwide (RNW) if anything could have been done to prevent witnesses withdrawing, he had this to say: "I don't think you could do anything to avoid the problem we have now because we protected our witnesses. We transferred them from Kenya to different places. But in some cases, we know families in Kenya were affected or threatened. When we investigate, we don't need to disclose who the witnesses are. But when you arrive at trial time – and that's the difference between the ICC and human rights groups – we should disclose our witnesses. And then the defence has the right to know them. And after that, it's much more difficult because they can go to see them in London or wherever they are. And people can threaten their families. So, it's part of the process." (Emphasis added), RNW (2014) Ocampo Exclusive: The First ICC Prosecutor Talks about the Kenyan Trials, https://www.youtube.com/watch?v=tHBwQwUzgYo last accessed on 31 October, 2015.

1788 Megret, F, (2002) The Politics of International Criminal Justice, 13 European Journal of International Law, p. 1263; Megret, F., (2001) Three Dangers for the International Criminal Court, XII Finish Yearbook of International Law, p.198.

vulnerable witnesses to the much needed protection. The ICC is a Court that is progressively gaining respect.1789 A call to account1790 for those bearing greatest responsibility for the most serious crimes is a world community concern1791 that should not be deflected by weaknesses of a witness protection system. Fundamental principles and factors that have been identified in this research are necessary for effective processes for ICC's witness protective measures. Apart from the **protective codes**, there has also been an identification of original and practical deductions that could aid the Court.

Firstly, there is recognition that the ICC is duty bound under ICL to protect all witnesses at risk. This duty to protect all vulnerable witnesses extends to all such witnesses among the community of states parties as well. Therefore, ICC organs in their varied roles as decision makers should recognise equality of arms among them. Both OTP and Defence should equally request for their witnesses to be protected or have equally enough resources to protect those that the system turns down. Policy formulation and legal interpretation of the VWU, Defence, OTP and Chambers should properly balance their roles in a way that reflects the balanced interests of values and justice for all witnesses and the accused persons. It has been suggested in Chapter five that a free-standing and independent Defence organ will help secure balanced interests of Defence witnesses. Defence should not be a section of the Registry. VWU should focus on implementing witness protective measures as an administrative machinery for the Court with the Chambers acting as a check and balance to all requests for protection. Secondly, increased resources or access thereto is essential for the success of witness protective measures. There has to be an on-going and constantly evaluated process of decision-making regarding allocation of resources to witness protection efforts by the Court. It has been suggested that an increased and sustainable institutional budget will help the successful implementation of protective measures if: there is clearly separated budget for witnesses from that of victims and reduction of witness protection budget due to

1789 Kaul, H, (2016) The International Criminal Court of the Future, in Schabas (Ed.) The Cambridge Companion to International Criminal Law, Cambridge, CUP, pp.335-354; Bassiouni, M,C, (2016) Challenges to International Criminal Justice and International Criminal Law, in Schabas (Ed.) *Op. Cit*, pp. 353-391.

1790 Duff, A, (2012) Authority and Responsibility in International Criminal Law, in Besson & Tasioulas (Eds.) *Op. Cit*, pp.594-597.

1791 Rome Statute, preamble, *para* 5.

economic constraints should always be a last resort measure, The Special Relocation Fund (SRF) should be complementary to national systems of witness protection.

Thirdly, witnesses with unusual circumstances or profiles should be accorded special attention. The main beneficiaries of witness protective measures are the individual witnesses themselves. Thus the process of decision-making and adjudication of witness protective measures should fully concentrate on their circumstances. The nature of crimes that are adjudicated before the Court cannot preclude testimony likely to come from witnesses with a particular profile. Thus it is only appropriate to factor in the 'circumstances' of the witness in the decision-making process so as to enable effective testimony at the Court, relocation and protection. Detention should be interpreted as a serious and qualifying personal circumstance. Detained witnesses should never be relocated to The Hague for testimony. This will limit recurring asylum requests. Evidence can be produced *in situ* or via video-link technology. This should provide an appropriate counterweight to the rights of an accused person. However, it has been suggested that there should be a monitoring mechanism1792 in the detaining state for adherence to rule of law, due process, commitment to governance and protection of basic rights for the detained witnesses. There must be negotiated cooperation arrangements with the ICC that can safeguard such rights for the detained witnesses. Post-testimony strategy should include re-evaluation of the security risk assessment so as to consider admission into the ICCPP or relocation. Infiltrated witnesses, should also be viewed by decision makers as having special personal circumstance that provide serious legal and political challenges as regards relocation. It has been suggested that there is need to establish a strategic framework that can advance effective relocation in a prospective host state. Skilful, deliberate and innovative negotiations should prioritise criminal justice systems that have legal tools for plea-bargaining. Such tools and systems are sympathetic to low level perpetrators testimony for purposes of prosecuting criminal organizational leadership. Thus it has been suggested that relocation negotiations to such states cannot be as complicated as those in states without such legal tools. Polygamous witnesses and witnesses with extended or large families should be interpreted by ICC decision makers as having special personal

1792 Regular visits by ICC officials; reports to ASP for violations; protective measures accorded where necessary including post-testimony protection strategy.

circumstances. Cultural diversity should therefore be a process factor for ICC relocation decision-making. Learning from how the WITSEC and the Italian witness protection system dealt with extended or large families relocations, relocations within geographical locations has been suggested as a priority for such witnesses. It would be easy for such families to blend in than in a totally different culture.

Fourthly, a cooperation strategy for the ICC as regards witness protection is another suggestion in this work. Internal cooperation and coordination among ICC organs should improve in order to fulfil the Court's duty towards witnesses. Mutual fair treatment to all relevant participants in decision-making process must be recognised. The Defence should not be side-lined but play a full and crucial role as regards adjudication of witness protective measures. Further, there should be balanced investigations as regards witness protection interference. In terms of states parties, the ICC practice of vertical cooperation with states parties should be revaluated. It has been suggested that horizontal approach to negotiations and cooperation arrangements can be more beneficial to the Court as securing the much needed confidential relocation agreements. Such an approach can promote equality values among states parties and the ICC as opposed to current ICC practice that assumes that states parties are duty bound to fulfil cooperation obligations. Further, such an approach has the potential for innovative engagement and consultations with central authorities before the circulation of draft confidential relocation agreements. Decision-makers should continuously work towards securing full commitment from states parties. National organizations, NGOS and International Organizations (IGOs) also contribute towards implementation of witness protective measures. It has been suggested that ICC should find a solid and independent mechanism for implementing such protective measures. NGOs and IGOs by their nature should not be the bedrock for implementation of protective measures. ICC should mainly focus on national organizations (states actors) in cooperation with established central liaison offices wherever investigations or prosecutions are being conducted. National witness protection programs should have a synergy with ICCPP so that there are similar standards for security risk assessment and admission criteria. This suggested interface of operating platforms will help the ICCPP's Initial Response Support (IRS) perform better. Further such an approach will promote clear, vibrant and systematic monitoring and post-trial follow-up programs including that of withdrawn or suspended ICC cases. Use of intermediaries as

regards witness protection should be to the minimum. Fifthly, advanced use of technology is another suggestion for the Court. It has been suggested that decision-making should embrace technological advancements including innovative solutions for challenges accompanying it. Video-link technology should always have an appropriate balancing effect on fair trial requirements for the accused person. Poor internet-connectivity especially in developing states parties has a likely impact on technological advancement. Further, varied laws regarding mutual legal assistance, legality of witness oath and offences against administration of justice committed by witness may prove a huge challenge. It has been suggested that pursuant to such technological advancements, ICC should resolve poor internet connectivity testimony on a case to case basis with a balancing effect on the rights to fair trial. Further, the ICC should always assume primacy of jurisdiction or negotiate at the earliest opportunity for such primacy over witnesses that happen to be in the ICCPP but have duly committed offences against the administration of justice.

Witnesses who come in contact with the Court and are at risk due to their testimony have a right to protection. Each time the ICC opens an investigation and prosecution, witness protection has become a core and relevant value of the adjudication process. As discussed above, full realisation of witness protection and security includes, but is not limited to, resource mobilisation and accessibility, fairness, cooperation, technological leverage, witness welfare, skill of personnel, integrity of the ICCPP, trustworthiness and reliability.

Sixthly, the ICC as a Court is an 'armless and legless giant'1793 that is solely dependent on states parties' cooperation. 1794 Creation of a conducive environment necessary for the full realization of witness protection and proper functioning of the ICCPP is necessary to the success of the protection system. Further, decision-makers should be able to come up with

1793 Wartanian, A. (2004) The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation: Lessons from the UN Tribunals Applied to the Case of Uganda, 36 Georgetown Journal of International Law, p.1289.

1794 Broomhall, B, (2003) *Op. Cit*, p.161; Cassese, A, *Op. Cit*, European Journal of International Law, p.170.

ways through which states parties can account for non-cooperation.1795 States parties have the duty to pursue all necessary measures that can ensure that ICC actors and decision-makers safeguard witnesses' access to basic resources for protection. Burke-White has argued that neither the ICC's legal mandate, nor the resources available to it, are sufficient to allow the Court to fulfil the world's high expectations.1796 It is thus a duty of states parties to ensure that basic survival tools are available to all witnesses at risk. States parties have the duty to cooperate with the Court in guaranteeing and giving effect to relocation agreements at the earliest opportunity. Further, the community of states parties are duty bound to ensure that certain obstacles to protection and relocation are innovatively negotiated and overcome. The world community of states parties with common interests and pursuant to their Rome Statute's commitments are duty-bound to take reasonable and collective steps at ASP sessions. These steps must be towards effective policing of cooperation regarding witness protection and accountability for non-compliance. The ASP is duty bound to ensure that ICC's policy formulation, legal interpretation and implementation of witness protective measures among its organs promote objectives of the Court. Ninthly, synergy of ICCPP and national protection systems in terms of operational mechanisms is a factor process that can improve security for vulnerable witnesses.

The main thesis in this research remains focussed on witness protective measures at the ICC. Its understanding squarely depends on how the world community of states parties conceptualise the processes such as policy formulation, legal interpretation of the Rome

1795 Article 87(5) and (7) of the Rome Statute limit the Court's referral to Security Council for non-cooperation only on SC referrals while non-cooperation on *proprio motu* powers is referred to the ASP. The challenge then is on whether the ICC can broadly request cooperation of a huge membership such as the UN General Assembly pursuant to Article 87(6) of the Rome Statute. President of the ICC, Fernandez de Gurmendi has recently evoked such support of the General Assembly arguing that *the widespread expectation and Court's central role in upholding such expectation of the international community requires heavily cooperation of states and organizations at every step of the process*, from investigations to arrests and from witness protection to enforcement of sentences, Judge Silvia Fernandez de Gurmendi President of the International Criminal Court, (2015) Presentation of the Court's Annual Report to the UN General Assembly, 5 November 2015, UN, New York, pp.1-2, https://www.icc-cpi.int/iccdocs/presidency/151105_ICC_President_speech_to_UNGA-Eng.pdf , last accessed on 12 November 2015; *see also* UN, Report of the International Criminal Court, UN General Assembly 70th Session, 28 August, 2015, A/70/350, https://www.icc-cpi.int/iccdocs/other/UNGA_2015-Eng.pdf last accessed on 12 November 2015.

1796 Burke-White, W. (2008) Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, 49 Harvard International Law Journal, p.54.

Statute and the ICC RPE, all the way to implementation. These intertwined decision-making notions concern the very essence and trajectory of the aspirations of the states parties *i.e.* justice and an end to impunity. This trajectory needs to be properly linked to the strategies employed to achieve it. Furthermore, there is a need to appraise as far as possible the extent to which these strategies are working towards goals of protecting vulnerable witnesses. Recommendations for witness protective measures need to be understood in the context of the wishes and commitments of the world community of states parties to the Rome Statute.

The question that this thesis has attempted to answer is whether policy-oriented jurisprudence can interpret witness protective measures at the ICC in order to properly apply and implement security for witnesses. Though the research has found the answer to this question to be in the affirmative, it is submitted that there is no single solution to the challenges involved in ICC witness protection. Attention cannot all the time be oriented around the ICC's prospective decision-makers and actors, factor processes and analysis of the core tenets that encompass protection and security of vulnerable witnesses. That notwithstanding, in this thesis a policy-oriented framework of inquiry makes a contribution to the development of contemporary witness protective measures. Such a contribution presents strategies employed by the Court in attempting to fulfil its Rome Statute obligations of protecting witnesses.1797 The exploration of witness protective measures at the ICC fulfils Luban's description of the practice of international criminal law as a product of discontinuity, upheaval and political rupture.1798 Further, and in line with Kirsch Philippe's argument,1799 the Rome Statute is a human construction, a reflection of varied different positions merged into one. It cannot be perfect and thus its implementations can never be smooth.1800 The cooperation processes and trials currently taking place carry with them political overtones and sometimes lead to a collision

1797 Articles 43 & 68 of the Rome Statute, and the ICC RPE.

1798 Luban, D, (2012) Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law, in Besson, S, & Tasioulas, J, (Eds.) The Philosophy of International Law, Oxford, OUP, pp.574-575.

1799 Kirsch, P, (1999) Introduction in Hebel, H, Lammers, J, Schukking, J, (Eds.) Reflections on the International Criminal Court: Essays in Honour of Adrian Bos, The Hague, TMC Asser Press, p.8.

1800 *Ibid.*

course between the requirements of politics and those of international criminal justice.1801 However, there is need to even-handedly and objectively advance the intention of the Rome Statute framers, namely, protection of all vulnerable witnesses. Re-evaluation of the system will hopefully curb witness harm, intimidation and corruption. The quality of justice towards witnesses is the Court's tool and strategy towards an end to impunity. Therefore, long term benefits towards witnesses at risk should be paramount to every interpretation, application and implementation of both policy and law at the Court. The ICC's witness protective measures jurisprudence is still developing. Thus decision-making processes that will work towards amelioration of witness circumstances will hugely contribute towards the formation and evolution of international criminal law.1802

1801*Ibid.*

1802 Sloane, R, (2009) More Than What Courts Do: Jurisprudence, Decision, and Dignity – In Brief Encounters and Global Affairs, 34 Yale Journal of International Law, pp.517-519.

7.0 APPENDIX A:

7.1 Research Questions (Semi-structured) – Final & After Supervisor Comments

1. In your opinion, how is witness protection working at the International Criminal Court (ICC)?
    1. What are the positives?
    2. What are the challenges in the following areas (if any)
        1. Inter-organ relationship (Any diverse decision making considerations on witness protection: OTP, Chambers, VWU, Defence)
        2. Any differing understanding or interpretation among ICC organs when it comes to protective measures?
        3. Which organ of the ICC in your understanding has the most challenges when it comes to witness protection?
        4. What are the Procedural (fair trial) challenges if any?
        5. What are the Non-procedural challenges (if any) in the following areas:

1. Relocation of witnesses
2. Witness Tampering
3. Agreements for cooperation
4. Support from NGOs
5. Post-testimony follows (long term and short term relocation)
6. Funding
7. Training for psychologists
8. Training for security officers
    1. How is the ICC handling infiltrated witnesses (or witnesses with dirty hands)?
    2. How is the ICC dealing with polygamous witnesses or witnesses with large families?
    3. How is the ICC dealing with intermediaries? Any need for protection?
    4. How is the ICC dealing with Asylum Witnesses?
    5. Unlawful/ blackmail requests from witnesses i.e. demands for money etc.
9. What standards are used in decision- making process as regards witness protection arrangements?

1. OTP witnesses
2. Defense Witnesses
3. Witness Tampering

10. How many witnesses are currently in the witness protection program? (any numbers?)
11. What could be done to improve the non-procedural protective measures at the ICC?
    1. Non-procedural? i.e. Psychological welfare, relocation strategy, cooperation agreements, improved working relations with NGOs?

7.2 **Breakdown of the Interviewees**

1. Victims and Witnesses Unit (VWU) – 3 officers
2. Defence - 3 officers
3. Office of the Prosecutor (OTP) – 3 officers
4. Chambers – 2 officers
5. Former OTP – 1
6. NGO official - 2

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